Supreme Court, U.S.
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No. –

IN THE

Supreme Court of the United States

CHARLES E. SWEENEY, JR.,

Petitioner,

v.

STEVE CARTER,
Attorney General of Indiana,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the Court of Appeals err when it held that this Court's decisions have not clearly established that the Fifth Amendment right to counsel under *Miranda v. Arizona*, 384 U.S. 436 (1966) is the right to *effective* counsel, as measured by the two-part test of *Strickland v. Washington,* 466 U.S. 668 (1984)?

II. Did the Court of Appeals err (a) in deciding the merits of issues as to which a Certificate of Appealability had not issued, with no notice to Petitioner and no opportunity for briefing of the merits; and (b) in denying a Certificate of Appealability as to one of these issues -- whether Petitioner's *Miranda* rights were violated when his statement was introduced at trial although it had been obtained during a preindictment custodial interrogation at which the authorities failed to administer the *Miranda* warnings and Petitioner's counsel falsely advised him his statements could not be used against him?

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OPINIONS OF THE LOWER COURTS

The opinion of the Court of Appeals for the Seventh Circuit, issued March 15, 2004, affirming the denial of habeas corpus relief, is reported as *Sweeney v. Carter,* 361 F.3d 327 and is included in the Appendix at A1-A14.

The order of the Court of Appeals of April 6, 2004, denying rehearing or rehearing en banc, is included in the Appendix at A15-A16.

The order of the Court of Appeals of August 30, 2002, granting a Certificate of Appealability ("COA") as to one issue only, is included in the Appendix at A17-A18.

The order of the Court of Appeals of October 3, 2002, denying reconsideration of the order granting COA as to one issue only, is included in the Appendix at A19.

The judgment of the United States District Court for the Southern District of Indiana, entered February 27, 2002, denying habeas corpus relief, is included in the Appendix at A20.

The entry of the District Court, dated February 27, 2002, discussing the petition for habeas corpus relief, is included in the Appendix at A21-A41.

The entry of the District Court, dated April 26, 2002, denying a COA as to all claims, is included in the Appendix at A42-A43.

The opinion of the Indiana Supreme Court, dated December 18, 1998, affirming Petitioner's conviction and sentence, is reported as *Sweeney v. State,* 704 N.E.2d 86

(Ind. 1998), *cert. denied,* 527 U.S. 1035 (1999), and the relevant portions thereof are included in the Appendix at A44-A57.

JURISDICTION OF THIS COURT

The decision of the Court of Appeals sought to be reviewed herein was issued March 15, 2004. Apx A1-A14. Rehearing and rehearing en banc was denied by order of April 6, 2004. Apx A15-A16. On June 29, 2004, this Court granted Petitioner an extension of time to and including September 3, 2004, to file this Petition.

This Court has statutory authority to review the decision of the Court of Appeals pursuant to 28 U.S.C. § 1254. *See also Hohn v. United States,* 524 U.S. 236 (1998) (Court has jurisdiction to review circuit court's denial of COA).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The **Fifth Amendment** to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The **Sixth Amendment** to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The **Fourteenth Amendment** to the United States Constitution provides, in relevant part:

> *Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. 2253(c) provides:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from --
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2254(d) provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

The relevant facts are not in dispute, as this Petition presents pure questions of law for this Court's consideration.

Petitioner, while under investigation regarding the death of Daniel Guthrie, was detained on related federal charges. *Sweeney v. Carter,* 361 F.3d 327, 329 (7th Cir. 2004), Apx A2. On June 26, 1992, Petitioner entered into a plea agreement resolving the federal charges, and agreed as part of the plea agreement to "disclose both the whereabouts of Guthrie's body and any information relating to the cause of Guthrie's death." *Id.,* at 329-30, Apx A3. Petitioner's decision to enter into this agreement was made after Petitioner's counsel advised him "that a use-immunity agreement was 'carved in stone' and that [Petitioner] Sweeney should take the deal with federal prosecutors and make as complete a statement as he could." *Id.,* at 330, Apx A3.

Four days later, while in federal custody, Petitioner was interrogated by law enforcement authorities. *Id.* Petitioner was accompanied by counsel, *Id.,* at 331, Apx A7, but the warnings required by *Miranda v. Arizona,*[1] were not given to Petitioner by the authorities. *Sweeney v. State,* 704 N.E.2d, at 104, Apx A50 ("The record reflects indisputable evidence that [Petitioner] was in federal custody and indeed was not advised of his *Miranda* rights."). Petitioner gave a full statement. 361 F.3d, at 330, Apx A3-A4; 704 N.E.2d, at 91, Apx A46-A47.

[1] 384 U.S. 436 (1966).

Petitioner's counsel was wrong — there was no valid use-immunity agreement. 361 F.3d, at 334, Apx A13 ("Any lawyer worth her salt should have known that an extrajudicial agreement that has not received the imprimatur of the court is unenforceable under Indiana law, let alone 'carved in stone.'"). Petitioner was indicted in state court, and his statement was introduced against him during the prosecution's case in chief. Petitioner's "knowledge of the location of [Guthrie's] body was an important piece of evidence" at the trial. *Id.,* at 330, Apx A4; *see also Id.,* at 334, Apx A13 ("[w]e have no doubt that Sweeney's knowledge of the location of Guthrie's body loomed large in the minds of the jury ...."). Petitioner did not testify, and was found guilty of murder and sentenced to sixty years in prison. *Id.,* at 330, Apx A4; 704 N.E.2d, at 92 n.4, Apx A46.

Petitioner's conviction and sentence were affirmed on direct appeal. *Sweeney v. State,* 704 N.E.2d 86 (Ind. 1998), *cert. denied,* 527 U.S. 1035 (1999). The Indiana Supreme Court rejected, *inter alia,* Petitioner's claims that the introduction of his statement violated *Miranda* and his right to the effective assistance of counsel. *Id.,* at 103-106, Apx A48-A56.

These claims were similarly rejected when Petitioner sought habeas corpus relief in federal district court. Apx A20. The District Court also denied a certificate of appealability ("COA"). Apx A42-A43. The Seventh Circuit granted a COA as to the issue of whether Petitioner was deprived of the effective assistance of counsel, but denied a COA as to other issues, including the issue of whether introduction of Petitioner's statement at trial violated *Miranda,* Apx A17-A18, and denied

reconsideration. Apx A19.

The Court of Appeals affirmed the denial of habeas relief. 361 F.3d 327, Apx A1 *et seq.* The Court of Appeals found that Petitioner could "easily meet" the test for ineffective assistance of counsel announced in *Strickland v. Washington,* 466 U.S. 668 (1984). 361 F.3d, at 334, Apx A13. However, the Court of Appeals found no "clearly established" right to effective assistance of counsel in the Fifth Amendment (*Miranda*) context. *Id.,* at 333, Apx A11.

Petitioner now petitions this Court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRED IN CONCLUDING THAT RELIEF WAS BARRED BY 28 U.S.C. § 2254, BECAUSE PETITIONER WAS CONSTITUTIONALLY ENTITLED TO COUNSEL AND COUNSEL RENDERED INEFFECTIVE ASSISTANCE UNDER THE TEST OF *STRICKLAND V. WASHINGTON,* 466 U.S. 668 (1984).

In 1970, this Court wrote: "It has long been recognized that the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson,* 397 U.S. 759, 771, n. 14 (1970) (citing *Reece v. Georgia,* 350 U.S. 85, 90 (1955); *Glasser v. United States*, 315 U.S. 60, 69-70 (1942); *Avery v. Alabama*, 308 U.S. 444, 446 (1940); and *Powell v. Alabama*, 287 U.S. 45, 57 (1932)).

Fourteen years later, this Court articulated the now familiar two-part standard for judging claims of ineffective

assistance of counsel, in *Strickland v. Washington,* 466 U.S. 668 (1984).[2] This Court explained the rationale behind the constitutional rule as follows:

> … That a person who happens to be a lawyer is present at trial alongside the accused … is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.
>
> For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970).

Id., at 685-86.

To be sure, *Strickland* was decided under the Sixth Amendment, as the Court was confronted with a claim of ineffective assistance of trial counsel. But while this Court described its holding in *Strickland* with reference to the Sixth Amendment, the right to effective assistance of counsel has been recognized — both before and after *Strickland* — regardless of where in the Constitution the

[2] The *Strickland* standard requires a showing that counsel's performance included acts or omissions "outside the wide range of professionally competent assistance," and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S., at 690, 694.

right to counsel is found.

Three of the four decisions relied upon by the *McMann* Court for the proposition that the right to effective assistance of counsel "has long been recognized" did not involve the Sixth Amendment guarantee of counsel, but rather the guarantee found in the Due Process Clause of the Fourteenth Amendment. Thus, in *Powell, supra,* the Court held that the "pro forma" appointment of counsel in a notorious capital case was "either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid" and violated due process. 287 U.S., at 53. In *Avery, supra,* the Court held the Due Process Clause was not violated, but noted that "mere formal appointment" would not satisfy the Constitution, because "the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel." 308 U.S., at 446 (footnote omitted). And in *Reece, supra,* the Court cited *Powell, supra,* for the proposition that the "effective assistance of counsel in [a capital] case is a constitutional requirement of due process ...." 350 U.S., at 90.

Thus it can be seen that the right to effective assistance of counsel which the *McMann* court recognized as having "long been recognized" stemmed from both the Due Process Clause (in state prosecutions as in *Powell, Avery,* and *Reece*) and the Sixth Amendment (in federal prosecutions as in *Glasser*). With this Court's decision in *Gideon v. Wainwright,* 372 U.S. 335 (1963), holding the Sixth Amendment guarantee of counsel applicable to state-

court prosecutions, the need for distinguishing between the Fourteenth Amendment right to effective assistance of trial counsel and the Sixth Amendment right disappeared. In this context, *Strickland* was decided.

Decisions after *Strickland* continue to demonstrate that "the right to counsel is the right to the effective assistance of counsel." In *Evitts v. Lucey,* 469 U.S. 387 (1985), this Court held that the due process right to appellate counsel necessarily includes a right to effective assistance of appellate counsel, because the right to counsel "would be a futile gesture unless it comprehended the right to the effective assistance of counsel." *Id.*, at 397. In reaching this holding the Court relied on the precedent of *Avery, McMann,* and *Strickland, supra.*

In *Murray v. Carrier,* 477 U.S. 478, 496 (1986) and *Smith v. Murray,* 477 U.S. 527 (1986), the Court made clear that the two-part *Strickland* test would apply to claims of ineffective assistance of counsel, even when such claims arise under the Fourteenth Amendment rather than the Sixth Amendment. In these decisions, the Court considered whether appellate counsel's ineffectiveness in failing to raise certain claims on direct appeal constituted "cause" for the procedural default sufficient to allow federal habeas review.[3] This Court stated: "So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington,* [466 U.S. 688 (1984)], we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." *Murray v. Carrier, supra,*

[3] *See also Smith v. Robbins,* 528 U.S. 259, 285 (2000) (remanding for consideration of appellate ineffectiveness claim under *Strickland* test) (citing *Smith v. Murray, supra*).

477 U.S., at 488. Conversely, where there is a constitutional right to counsel, a default caused by ineffective assistance is "imputed to the State." *Id.*, at 488.

In *Coleman v. Thompson,* 501 U.S. 722 (1991), this Court explained:

> In other words, it is not the gravity of the attorney's error that matters, but that it constitutes a violation of petitioner's right to counsel, so that the error must be seen as an external factor, i. e., "imputed to the State." *See also Evitts v. Lucey*, 469 U.S. 387, 396 (1985) ("The constitutional mandate [guaranteeing effective assistance of counsel] is addressed to the action of the State in obtaining a criminal conviction through a procedure that fails to meet the standard of due process of law").
>
> Where a petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default and the harm to state interests that federal habeas review entails. ... In the absence of a constitutional violation, the petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation, as Carrier says explicitly.

Id., at 754. In *Coleman,* the Court considered whether attorney error could constitute "cause" for a procedural default that occurred on appeal from the denial of postconviction relief. The Court noted that "[w]hat Coleman requires [in order to establish "cause"] is a right to counsel" at that appellate stage. *Id.*, at 756. Finding no

such constitutional right to counsel, the Court held that any attorney error would be attributed to Coleman, and therefore could not constitute "cause" for the procedural default. *Id.*, at 757.

From these cases, the following principles are apparent. First, any constitutional right to counsel in criminal cases embodies the right to effective assistance of counsel. This was true of the pre-*Gideon* right to counsel found in the Due Process Clause of the Fourteenth Amendment (*see Powell, Avery, Reece*), of the right to trial counsel found in the Sixth Amendment (*see Glasser*, *Strickland*), and of the right to appellate counsel found in the Due Process Clause. *See Evitts v. Lucey.* Simply put, "the right to assistance of counsel is the right to the effective assistance of counsel." *McMann, supra.*

Second, the *Strickland* test is not limited to the Sixth Amendment context, but rather is applicable to all claims of ineffective assistance of counsel, regardless of where the right to counsel is found. Constitutionally required counsel who fails the *Strickland* test gives his or her client "cause" for procedural default — counsel's shortcomings are attributed to the state, not the client, where the state has a constitutional obligation to provide counsel. *Murray v. Carrier, supra.* Were the *Strickland* test for ineffectiveness tied to the Sixth Amendment, this Court could have dispensed with the questions raised in *Murray v. Carrier*, *Smith v. Murray*, and *Coleman v. Thompson, supra,* by simply pointing out that the *Sixth* Amendment applies to trial counsel only, rather than seeking to discern whether the *Fourteenth* Amendment guarantees counsel at various post-trial stages.

Contrary to the lessons of this Court's precedent, the Court of Appeals performs a semantic surgery which disentangles the constitutional right to counsel from the constitutional right to effective assistance of counsel, and does violence to this Court's rulings. The logic of the Court of Appeals is as follows: Because *Strickland* is "authority that relies on the Sixth Amendment," 361 F.3d, at 334, Apx A12, and because "in the Sixth Amendment context … the right to counsel attaches only at the initiation of adversary criminal proceedings, and not before," *Id.*, at 333, Apx A12 (citation omitted), therefore there is no right to effective assistance of counsel under *Strickland* during a preindictment custodial interrogation. This logic allows the Court of Appeals to find no "clearly established" right to effective assistance of counsel under the Fifth Amendment. *Id.*, at 333, Apx A11. In fact there is no precedent to support the notion that a criminal defendant might have, at some moment in time, a constitutional right to counsel without a concomitant right to the effective assistance of such counsel. Through its flawed logic, the Court of Appeals suggests that Petitioner seeks an "extension" of *Strickland* to a "novel context[]." *Id.*, at 334, Apx A12. In fact, it is the Court of Appeals which amputates *Strickland* in order to confine that decision to a jurisprudential compartment in the Sixth Amendment which it has long since outgrown.

Relief is appropriate under 28 U.S.C. § 2254 when a state court determination is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A state court decision is "contrary to … clearly established Federal law" if it "applies a rule

that contradicts the governing law set forth in [the] cases" of this Court or if it "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Williams v. Taylor,* 529 U. S. 362, 405-406 (2000). "The word `contrary' is commonly understood to mean `diametrically different,' `opposite in character or nature,' or `mutually opposed.'" *Id.*, at 405 (quoting Webster's Third New International Dictionary 495 (1976)).

Here, this Court's cases clearly establish that a constitutional right to counsel is necessarily a right to effective counsel. This Court's cases further establish that the *Strickland* test for ineffective assistance is applicable regardless of the source of the right to counsel, and is not limited to the Sixth Amendment right to counsel. The Indiana Supreme Court's determination of this issue (and that of the Court of Appeals) was contrary to this Court's decisions in two ways. First, the Indiana Supreme Court and the Court of Appeals recognized that Petitioner had a constitutional right to counsel under the Fifth Amendment, but failed to recognize that this Court's decisions indicate the right to counsel necessarily entails the right to effective assistance of counsel. Second, the Indiana Supreme Court and the Court of Appeals determined that the *Strickland* test would not apply in the Fifth Amendment context, contrary to this Court's decisions indicating the *Strickland* test is applicable whenever there is a constitutional right to counsel.

It must be conceded that there is no decision of this Court specifically addressing an ineffective assistance of counsel claim in the Fifth Amendment context. Yet "[c]ertain principles are fundamental enough that when new

factual permutations arise, the necessity to apply the earlier rule will be beyond doubt. *Yarborough v. Alvarado,* __ U.S. __, __, 124 S.Ct. 2140, 2151 (2004). This should be especially so when the only route to affirming the state court's decision is by logical steps that are contrary to this Court's prior decisions.

Furthermore, this Court's decisions reveal no reason to afford a criminal defendant the right to effective assistance of counsel at a post-indictment custodial interrogation while denying the same right at a preindictment custodial interrogation. This Court's decision in *Patterson v. Illinois,* 487 U.S. 285 (1988) eliminates any possibility of a meaningful distinction between the *Miranda* (Fifth Amendment) right to counsel at a preindictment custodial interrogation and the Sixth Amendment right to counsel at a post-indictment custodial interrogation.

In *Patterson,* this Court determined that execution of a form waiving *Miranda* rights was effective as a waiver of the Sixth Amendment right to counsel at a post-indictment custodial interrogation. In so holding, this Court rejected the notion that the Sixth Amendment right to counsel was "superior" to the Fifth Amendment right, choosing instead to take a

> more pragmatic approach to the waiver question — asking what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage — to determine the scope of the Sixth Amendment right to counsel, and the type of warnings and procedures that should be required before a waiver of that right will be recognized.

487 U.S., at 298.

This Court found no "substantial difference between the usefulness of a lawyer to a suspect during custodial interrogation, and his value to an accused at post-indictment questioning." *Id.*, at 299. "The State's decision to take an additional step and commence formal adversarial proceedings against the accused does not substantially increase the value of counsel to the accused at questioning, or expand the limited purpose that an attorney serves when the accused is questioned by authorities." *Id.*, at 298-99. Accordingly, this Court found that an effective waiver of the Fifth Amendment right to counsel would also be effective as a waiver of the Sixth Amendment right to have counsel present at post-indictment questioning. *Id.*, at 300.

The holding of the Court of Appeals cannot be reconciled with the logic of *Patterson*. If counsel is guaranteed both preindictment and post-indictment, albeit pursuant to different constitutional provisions, and counsel's function and value to the accused is the same at each stage, it defies reason to hold either: that the accused is entitled to effective representation at one stage but not the other, *see Minnick v. Mississippi,* 498 U.S. 146, 147 (1990) (requiring counsel's actual presence at custodial interrogation, because to hold otherwise might "distort the proper conception of the attorney's duty to the client and set us on a course at odds with what ought to be *effective representation.*") (emphasis added); or that the test of counsel's effectiveness at one stage should be inapplicable at the other.

"Of all the rights that an accused person has, the right to be represented by counsel is by far the most

pervasive, for it affects his ability to assert any other rights he may have." *United States v. Cronic,* 466 U. S. 648, 653-54 (1984) (citation omitted). This is no less true of the Fifth Amendment right to counsel than it is of the Sixth Amendment right to counsel. The Fifth Amendment right to counsel has as its "prime purpose … to guarantee full effectuation of the privilege against self-incrimination, the mainstay of our adversary system of criminal justice." *Johnson v. New Jersey,* 384 U.S. 719, 729 (1966). No less than the Sixth Amendment, the Fifth Amendment right to counsel "safeguards a fundamental trial right." *Withrow v. Williams,* 507 U.S. 680, 691 (1993) (quoting *United States v. Verdugo-Urquidez,* 494 U.S. 259, 264 (1990)); *see also Schneckloth v. Bustamonte,* 412 U.S. 218, 240 (1973) (the "basis for [*Miranda*] decision was the need to protect the fairness of the trial itself").

Just as the "Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results," *Strickland, supra,* 466 U.S., at 685, so does the Fifth Amendment right to counsel protect a fair trial. The Fifth Amendment right to effective counsel rests on the same constitutional underpinnings as that announced in *Strickland* with regard to the Sixth Amendment right.

It has been said that "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to the police under any circumstances." *Watts v. Indiana,* 338 U.S. 49, 59 (1949) (opinion of Jackson, J.). Here, by contrast, Petitioner's lawyers advised him that a use-immunity agreement was "carved in stone" and that Petitioner should "make as complete a statement as he

could" to the authorities. 361 F.3d, at 330, Apx A3. The Court of Appeals held that "[v]iewing the facts in nearly any light," Petitioner could "easily meet both parts of the *Strickland* standard ...." *Id.*, at 334, Apx A13. Yet the Court of Appeals found that the "lack of Supreme Court authority sinks Sweeney's claim." *Id.*, at 334, Apx A13. As the foregoing discussion shows, there was ample Supreme Court authority to direct the Court of Appeals and the Indiana Supreme Court to a proper resolution of this claim. It was only by logic contrary to this Court's precedent that the lower courts were able to deny relief to Petitioner.

II. THE COURT OF APPEALS ERRED WHEN IT DENIED A CERTIFICATE OF APPEALABILITY AS TO TWO ISSUES, CONSIDERED THE ISSUES ON THE MERITS WITHOUT PERMITTING PETITIONER TO BRIEF THE ISSUES, AND DECIDED THE ISSUES INCORRECTLY.

A. Petitioner was denied due process when the Court of Appeals considered the merits of two claims as to which Petitioner had been denied a certificate of appealability, without providing notice to Petitioner or an opportunity for briefing.

In habeas corpus actions governed by the AEDPA, an appeal may be taken only when the District Court or the Court of Appeals has issued a certificate of appealability

("COA"). 28 U.S.C. § 2253(c)(1). A COA may issue only when the appellant has made a "substantial showing of the denial of a constitutional right." *Id.*, § 2253(c)(2). The court issuing the COA must determine "which specific issue or issues" meet this standard. *Id.*, § 2253(c)(3).

In *Miller-El v. Cockrell,* 537 U.S. 322 (2003), this Court clarified the procedures for addressing the COA issue. The determination as to whether a COA should issue is a different inquiry from the determination of the merits of the underlying constitutional claim raised — "a COA does not require a showing that the appeal will succeed. … After all, when a COA is sought, the whole premise is that the prisoner '"has already failed in that endeavor."'" 537 U.S., at 337 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). And because the COA requirement is jurisdictional in nature, the determination as to whether a COA should issue is a "threshold inquiry into whether the circuit court may entertain an appeal." *Miller-El*, 537 U.S., at 336 (quoting *Slack v. McDaniel*, 529 U.S. 473, 482 (2001); *Hohn v. United States*, 524 U.S. 236, 248 (1998)). "Before the issuance of a COA, the Court of Appeals ha[s] no jurisdiction to resolve the merits of petitioner's constitutional claims." *Miller-El,* 537 U.S., at 342.

This Court in *Miller-El* specifically disapproved the practice of merging the COA determination into a determination of the merits of the underlying constitutional claim:

> Th[e] threshold inquiry [as to issuance of a COA] does not require full consideration of the factual or legal bases adduced in support of the claims. *In fact, the statute forbids it.* When a court of appeals side

> steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

537 U.S., at 336-37 (emphasis added); *see also id.*, at 342 ("[A] COA determination is a separate proceeding, one distinct from the underlying merits. *Slack*, 529 U.S., at 481; *Hohn*, 524 U.S., at 241. ... Deciding the substance of an appeal in what should only be a threshold inquiry undermines the concept of a COA.").

Most circuit courts have readily accepted the proposition that the issuance of a COA is a prerequisite to the exercise of appellate jurisdiction over the merits of a constitutional claim, and its logical corollary that an appellate court may not reach the merits of claims as to which no COA has issued. *E.g., Bugh v. Mitchell*, 329 F.3d 496, 502 n.1 (6th Cir.), *cert. denied, Bugh v. Bradshaw*, __ U.S. __, 124 S.Ct. 345 (2003); *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir.), *cert. denied, Henry v. Dretke*, __ U.S. __, 124 S.Ct. 408 (2003); *Hines v. Miller*, 318 F.3d 157, 162 (2d Cir.), *cert. denied,* 538 U.S. 1040 (2003); *Jones v. United States,* 224 F.3d 1251 (11th Cir. 2000); *James v. Giles*, 221 F.3d 1074, 1076 (9th Cir. 2000); *Bui v. DiPaolo,* 170 F.3d 232, 236-37 (1st Cir. 1999), *cert. denied,* 529 U.S. 1086 (2000); *Ramsey v. Bowersox,* 149 F.3d 749, 759 (8th Cir. 1998), *cert. denied,* 525 U.S. 1166 (1999).

The Seventh Circuit, by contrast, has rejected the notion that a proper COA is jurisdictional, substituting an analysis focused solely on judicial economy. In *Young v. United States,* 124 F.3d 794 (7th Cir. 1997), *cert. denied,* 524 U.S. 928 (1998), the Seventh Circuit put forth its view

of the COA as a mere "screening device," eschewing the idea that "a proper certificate is a jurisdictional requirement." *Id.*, at 799; *cf. Carter v. Litscher,* 275 F.3d 663, 665 (7th Cir. 2001) (reaching merits of claim where state did not object to facially invalid COA and thereby "forfeited the benefits" of § 2253) (citations omitted).

In *Hohn, supra,* Justice Scalia cited the Seventh Circuit's opinion in *Young, supra,* with approval in a dissent joined by joined by the Chief Justice and Justices O'Connor and Thomas. Justice Scalia cited *Young* as authority for the proposition that the COA is a "screening device," arguing that this screening function "distinguishes a COA from the jurisdictional issues discussed" in the majority opinion. 524 U.S., at 257-58. Section 2253, wrote Justice Scalia, "prevents petitioner's case from entering the Court of Appeals at all in the absence of a COA, whereas other jurisdictional determinations are made after a case is in the Court of Appeals (even if the case is later dismissed because of jurisdictional defects)." *Id.,* at 258 (citations omitted).

In light of *Hohn,* the Third Circuit criticized the Seventh Circuit's opinion in *Young.* The Third Circuit's opinion, in *United States v. Cepero,* 224 F.3d 256 (3d Cir. 2000), noted that "[s]everal of our sister courts of appeals have reached the merits of prisoners' appeals [absent a COA] based on the reasoning that § 2253(c)(2) is not jurisdictional in nature." *Id.,* at 260 (citing, *inter alia, Young, supra*). The court went on to note that this Court in *Hohn* "rejected the notion advanced by the respondent in the case before it, and explicit in the reasoning in *Young* [and other cases], that a certificate of appealability is merely a screening device." *Id.,* at 261.

This Court's decision in *Miller-El* explicitly stated that the COA requirement is jurisdictional in nature. *Miller-El*, 537 U.S., at 336, 342. Regrettably, the Seventh Circuit's non-jurisdictional view of the COA has persisted even after this Court's explicit holding to the contrary. Two Seventh Circuit decisions after *Miller-El* show the circuit court's sole consideration is for judicial economy. *Buie v. McAdory* 322 F.3d 980, 982 (7th Cir. 2003) (analyzing three categories of cases involving deficient COAs, and indicating desirable result in each case based on judicial economy); *Davis v. Borgen*, 349 F.3d 1027, 1028 (7th Cir. 2003) (vacating deficient COA because to do so "could save some time for counsel, and without creating any risk of duplicate judicial work").

Buie was decided just over two weeks after *Miller-El,* and the Seventh Circuit did not cite *Miller-El.* The *Buie* opinion did, however, respond to the Third Circuit's criticism in *Cepero, supra. Buie*, *supra,* 322 F.3d, at 982 ("We do not share the Third Circuit's view that *Hohn* [*supra*] compels the conclusion that the issuance of a complying certificate of appealability is jurisdictional."). And, nearly nine months after *Miller-El*, in an opinion which cites *Miller-El,* the Seventh Circuit in *Davis v. Borgen, supra,* still determined the COA question there solely on the basis of judicial economy, an analysis which would have been unnecessary had the Seventh Circuit recognized the jurisdictional nature of the COA. 349 F.3d, at 1028.

Consistent with its view of the COA as a mere "screening device," *Young, supra,* the Seventh Circuit has retained a procedure for expanding a COA to include additional issues which is at odds with this Court's

decisions in *Miller-El* and *Slack*, *supra*. In *Williams v. Parke*, 133 F.3d 971 (7th Cir. 1998), the court held that the briefing of issues not contained in the COA would be construed as an implicit request for a COA on such issues. *Id.*, at 975; *accord Ouska v. Cahill-Masching*, 246 F.3d 1036 (7th Cir. 2001); *Dellinger v. Bowen*, 301 F.3d 758 (7th Cir. 2002), *cert. denied*, 537 U.S. 1214 (2003); *Cage v. McCaughtry*, 305 F.3d 625 (7th Cir. 2002); *Aleman v. Sternes*, 320 F.3d 687 (7th Cir.), *cert. denied*, 539 U.S. 960 (2003).

This seemingly unique[4] procedure transforms the COA procedure from a "threshold inquiry into whether the circuit court may entertain an appeal," *Slack v. McDaniel*, 529 U.S. 473, 482 (2001), into a "full consideration of the factual or legal bases adduced in support of the claims." *Miller-El*, 537 U.S., at 336. The Seventh Circuit has adopted a procedure declared by this Court to be forbidden by 28 U.S.C. § 2253. *Id.* The "court of appeals side steps this [statutorily mandated] process by first deciding the

[4] The Ninth Circuit adopted the Seventh Circuit's procedure in *United States v. Cruz-Mendoza*, 147 F.3d 1069, 1074-75 (9th Cir. 1998) (citing *Williams v. Parke*), *as amended by United States v. Cruz-Mendoza*, 163 F.3d 1149 (9th Cir. 1998), *cert. denied, Cruz-Mendoza v. United States*, 528 U.S. 1013 (1999), but adopted Circuit Rule 22-1 (effective January 1, 1999) requiring an appellant to file a motion for an expanded COA within thirty-five days of the appellate court's order denying a COA as to one or more issues. *Valerio v. Crawford*, 306 F.3d 742, 748 (9th Cir. 2002), *cert. denied, McDaniel v. Valerio*, 538 U.S. 994 (2003). The Second Circuit appears to have followed the Seventh Circuit initially, *see Guerrero v. United States*, 186 F.3d 275, 279 (2d Cir. 1999) (citing *Williams v. Parke, supra*), but has since adopted the position of the remaining circuit courts. *E.g.*, *Hines*, *supra*, 318 F.3d, at 162 (holding Second Circuit lacked jurisdiction to consider issue not included in COA).

merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, [and] it is in essence deciding an appeal without jurisdiction." *Id.*

Here, Petitioner was granted a COA only on the issue of counsel's ineffectiveness. Petitioner sought reconsideration as to the remaining two issues and was denied. Petitioner then submitted his appellate brief, addressing only the issue as to which the COA had issued.[5] The Court of Appeals nonetheless addressed the merits of all three issues, criticizing Petitioner's brief for being unclear as to "whether [Petitioner] is trying to pursue those theories independently, or if he instead is mentioning them only in support of his ineffective assistance claim." 361 F.3d, at 331, Apx A6.

As *Miller-El* makes clear, the Court of Appeals had no jurisdiction to reach the merits of the claims as to which it had denied a COA. And to address those claims without permitting briefing by Petitioner amounts to a violation of due process. "Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure. Without such notice, the Court is denied the benefit of the adversary process." *Lankford v. Idaho,* 500

[5] Petitioner also sought certiorari review in this Court, which was denied. (No. 02-1033). At the time Petitioner filed his petition for writ of certiorari in this Court, it was reasonable to believe it was necessary to do so, even though proceedings continued in the Court of Appeals on the merits of the one issue as to which a COA was granted. *See Hohn, supra* (holding COA proceeding is a "case" in the court of appeals for purposes of determining this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1)). Since then, this Court has made clear that an appellant who has been granted a COA on one issue but denied a COA as to one or more issues should petition this Court for writ of certiorari at the conclusion of appellate proceedings in the circuit court, as was done in *Banks v. Dretke,* __ U.S. __, 124 S.Ct. 1256 (2004).

U.S. 110, 126 (1991) (footnote omitted). Here, as in *Lankford,* Petitioner was denied notice of the nature of the proceedings, and was deprived of the opportunity to offer persuasive arguments as to the issues considered by the court. He was denied "the basic ingredient of due process, namely, an opportunity to be allowed to substantiate a claim before it is rejected." *Solesbee v. Balkcom,* 339 U.S. 9, 23 (1950) (Frankfurter, J., dissenting).

B. Denial of the COA was improper, because Petitioner made a substantial showing of the denial of his *Miranda* rights where his statement was introduced at trial although it had been obtained during a preindictment custodial interrogation at which the authorities failed to administer the *Miranda* warnings and Petitioner's counsel falsely advised him his statements could not be used against him.

28 U.S.C. § 2253(c) permits issuance of a COA only where the habeas petitioner has made a "substantial showing of the denial of a constitutional right." Where, as here, a district court has rejected the habeas petitioner's constitutional claims on the merits, the showing required to justify issuance of a COA is straightforward: "The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel, supra,* 529 U.S., at 484. Because the AEDPA applies to the petition here, the Court of Appeals was obligated to "look to the District Court's application of AEDPA to petitioner's

constitutional claims and ask whether that resolution was debatable among jurists of reason." *Miller-El,* 537 U.S., at 336. Resolution of a COA application "requires a preliminary, though not definitive, consideration of the" legal framework and factual bases of the claims. *Id.,* at 338.

A preliminary consideration of Petitioner's claim that admission of his statements at trial contravened *Miranda v. Arizona,* 384 U.S. 436 (1966) will persuade this Court that the Court of Appeals erroneously denied a COA on this issue and that the issue must be decided in Petitioner's favor.

Petitioner can "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel, supra,* 529 U.S., at 484. Indeed the Court of Appeals found the District Court's assessment of the *Miranda* claim "debatable or wrong," describing "several apparent missteps on the part of the courts that have already reviewed this [claim]." 361 F.3d, at 331, Apx A6. The Court of Appeals continued:

> [T]he Indiana Supreme Court and the district court agreed that defense counsel's advising of Sweeney of his rights prior to his making the June 30 statement to federal authorities … served as a "fully effective equivalent" to the usual *Miranda* warnings. No authority of which we are aware holds that a suspect's discussions with defense counsel can double for the usual warnings given by law enforcement officers; indeed, the *contrary* position — that whatever warnings are otherwise required by *Miranda* must be administered by the public

authorities — is *quite well-established.*

Id., at 331, Apx A6 (citation omitted; emphasis added).

To put it another way, the Court of Appeals found that the state court (and District Court) determination of the issue was "contrary to … clearly established Federal law," making relief appropriate under 28 U.S.C. § 2254(d)(1), provided the "clearly established Federal law" is embodied in the decisions of this Court. And indeed, this Court has clearly established that the *Miranda* warnings are to be administered by the police. *See, e.g., Dickerson v. United States,* 530 U.S. 428, 435 (2000) (*Miranda* "established that the admissibility in evidence of any statement given during custodial interrogation of a suspect would depend on whether the police provided the suspect with four warnings."); *Moran v. Burbine,* 475 U.S. 412, 420 (1986) (*Miranda* "imposed on the police an obligation to follow certain procedures in their dealings with the accused. In particular, prior to the initiation of questioning, they must fully apprise the suspect of the State's intention to use his statements to secure a conviction, and must inform him of his rights to remain silent and to 'have counsel present . . . if [he] so desires.'"); *United States v. Patane,* __ U.S. __, __, 124 S.Ct. 2620, 2631 (2004) (Souter, J., dissenting) ("Unless the police give the prescribed warnings … a custodial confession is inadmissible ….").

Unsatisfied with the analysis of the District Court and the Indiana Supreme Court (as the analysis of these courts was "contrary" to "quite well-established" Federal law), the Court of Appeals substituted its own reasoning, which was similarly erroneous and contrary to this Court's precedent. The Court of Appeals proceeded to determine

that the "record here shows unequivocally that [Petitioner] Sweeney knowingly and voluntarily waived his *Miranda* rights." 361 F.3d, at 331, Apx A7. This determination was erroneous because this Court's precedent establishes that failure to administer the *Miranda* warnings is the end of the inquiry, and because even if a court could properly proceed to consider whether an unwarned suspect "waived" his *Miranda* rights, it would not be reasonable to conclude that a waiver occurred here, under the circumstances.

"[T]he *Miranda* rule creates a presumption of coercion, in the absence of specific warnings, that is generally irrebuttable for purposes of the prosecution's case in chief." *United States v. Patane,* __ U.S., at __, 124 S.Ct. at 2627 (Opinion of Thomas, J.). "Unless the police give the prescribed warnings … a custodial confession is inadmissible, there being no need for the previous time-consuming and difficult enquiry into voluntariness." *Id.,* at __, 124 S.Ct. at 2631 (Souter, J., dissenting). Because interrogation without warnings is considered presumptively coercive, there is no need for any further inquiry. The "core ruling" of *Miranda* is "that unwarned statements may not be used as evidence in the prosecution's case in chief." *Dickerson, supra,* 530 U.S., at 443-44.

The *Miranda* opinion itself makes clear that a court may not proceed to consider the question of a suspect's waiver of *Miranda* rights until the prosecution has established the giving of the *Miranda* warnings:

> After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But

> *unless* ***and*** *until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.*

Miranda, supra, 384 U.S., at 479 (footnote omitted) (emphases added); *see also Missouri v. Seibert,* __ U.S. __, __, 124 S.Ct. 2601, 2608 (2004) (Opinion of Souter, J.) ("*Miranda* conditioned the admissibility at trial of any custodial confession on warning a suspect of his rights: failure to give the prescribed warnings *and* obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained.") (emphasis added). Because the prosecution here could not prove that the *Miranda* warnings were given, it was inappropriate for the Court of Appeals to analyze whether Petitioner waived his *Miranda* rights.

Even were it proper for the Court of Appeals to consider the question of waiver, the conclusion of the Court of Appeals was wildly erroneous. *Miranda* does hold that the "defendant may waive effectuation" of the *Miranda* rights "provided the waiver is made voluntarily, knowingly and intelligently," upon a consideration of the "totality of circumstances." 384 U.S., at 444, 475. Far from establishing waiver, the "totality of circumstances" here eviscerate any notion that Petitioner waived his *Miranda* rights.

Two vital facts were not addressed in the Seventh Circuit's waiver analysis: First, the authorities interrogating Petitioner on behalf of the State of Indiana failed to warn Petitioner that his statements could be used against him in a state court prosecution; Second, Petitioner's attorneys erroneously advised him a use-immunity agreement was

"carved in stone" and his statement could not be used against him.

In *Moran v. Burbine, supra,* this Court held that any waiver of *Miranda* rights, to be knowing and intelligent, "must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." 475 U.S., at 421. Here, assuming *arguendo* that Petitioner had a "full awareness" of his right to remain silent, it cannot be argued that he had a similar awareness of "the consequences of the decision to abandon" this right. Based on the lack of warnings and his own counsel's advice, Petitioner reasonably understood there to be *no* adverse consequences flowing from a decision to abandon his right to remain silent. This, of course, was incorrect as a matter of law.

Additionally, the Seventh Circuit's conclusion that Petitioner could "easily meet both parts of the *Strickland* standard," 361 F.3d, at 334, Apx A13, should have led the Seventh Circuit to a conclusion that any purported waiver of *Miranda* rights was not voluntary in the constitutional sense. The test for a waiver of *Miranda* rights is that set forth in *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). *Miranda,* 384 U.S., at 475. The test for validity of a guilty plea — whether the plea is intelligent and voluntary — is similarly traceable to *Zerbst. See Hill v. Lockhart,* 474 U.S. 52, 56 (1985) (citing *Boykin v. Alabama*, 395 U.S. 238, 242 (1969)); *Boykin*, *supra*, 395 U.S., at 243 n. 5 (citing *Zerbst*).

In *Hill v. Lockhart, supra,* this Court held that where "a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's

advice 'was within the range of competence demanded of attorneys in criminal cases.'" 474 U.S., at 56 (citing *McMann v. Richardson, supra,* 397 U.S., at 771). This Court then applied the *Strickland* test to the question of the voluntariness of a plea. Since the voluntariness inquiry in the plea context and the voluntariness inquiry in the *Miranda* waiver context are both applications of the *Zerbst* "totality of circumstances" test, it is reasonable to believe that a failure of constitutionally required counsel in the plea context and a failure of constitutionally required counsel in the *Miranda* context would be judged by the same constitutional measure — the *Strickland* test. Judged by this measure, Petitioner's purported waiver of his *Miranda* rights must be deemed involuntary because occasioned by the ineffective assistance of his counsel.

At a minimum, the Court of Appeals was obligated to issue a COA on the issue of whether *Miranda* was violated by the admission of Petitioner's statement during the prosecution's case in chief. The Court of Appeals held that the Indiana Supreme Court and the District Court had ruled "contrary" to "quite well-established" Federal law. Additionally, the Court of Appeals proceeded to analyze the question by disregarding this Court's applicable precedent. *Miranda*, *supra*; *Moran, supra*; *Hill, supra.* Not only was the *Miranda* issue "debatable among jurists of reason" — the issue should have been decided in Petitioner's favor.

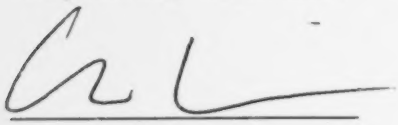
CONCLUSION

This Court must grant certiorari because the Court of Appeals (and the District Court and the Indiana Supreme Court) decided an important question of federal law in a

way that conflicts with the relevant decisions of this Court. Each of the courts below decided that the Fifth Amendment right to counsel set forth in *Miranda v. Arizona, supra,* does not include a right to effective assistance of counsel as defined in *Strickland v. Washington, supra.* This Court's decisions clearly establish that a criminal defendant is entitled to effective assistance of counsel at a preindictment custodial interrogation, and that the test set forth in *Strickland v. Washington, supra,* is the measure of counsel's effectiveness.

Additionally, this Court must grant certiorari because the Court of Appeals decided an important question of federal law -- whether Petitioner's *Miranda* rights were violated when his statement was introduced at trial although it had been obtained during a preindictment custodial interrogation at which the authorities failed to administer the *Miranda* warnings and Petitioner's counsel falsely advised him his statements could not be used against him -- when the Court of Appeals had no jurisdiction over the issue, and in conflict with the relevant decisions of this Court. This Court must also grant certiorari because the Court of Appeals continues to decide an important question of federal law -- the jurisdiction of a circuit court in federal habeas corpus proceedings -- in defiance of this Court's precedent and contrary to most of its sister circuits. The Seventh Circuit's disregard for the COA procedures established by statute and clarified by this Court's precedent deprived Petitioner of due process here when the Court of Appeals proceeded to a decision as to the merits of two issues which were not briefed by Petitioner.

Respectfully submitted,



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APPENDIX

In the United States Court of Appeals
For the Seventh Circuit

No. 02-2165

CHARLES E. SWEENEY, JR.,

Petitioner-Appellant,

v.

STEVE CARTER, Attorney General of Indiana,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Indiana, New Albany Division.
No. 00-72-C-B/S—**Sarah Evans Barker**, *Judge.*

ARGUED MAY 15, 2003-DECIDED MARCH 15, 2004

Before BAUER, COFFEY, and DIANE P. WOOD, *Circuit Judges.*

DIANE P. WOOD, *Circuit Judge.* Laypersons sometimes do not realize that the federal government and the state governments are separate sovereigns for purposes of criminal prosecutions, and thus that prosecutors from both may pursue charges for conduct covered by both laws. Lawyers should know better. To his regret, Charles Sweeney made this mistake after his lawyer concluded a

plea agreement with the U.S. Attorney's Office in conjunction with certain charges stemming from the murder of Daniel Guthrie. The lawyer told Sweeney that this agreement, coupled with an alleged oral promise from the state prosecutor's office, protected him from any use the state might have made of these statements. The state of Indiana thought differently, and based on the information Sweeney gave to the federal authorities, it investigated, brought charges, and convicted him for Guthrie's murder. After exhausting his appeals at the state level, Sweeney sought habeas corpus relief on the ground that his attorneys' mistaken advice about the alleged use-immunity agreement amounted to constitutionally ineffective assistance under the *Fifth* Amendment to the U.S. Constitution (not the Sixth). Because no such right has been clearly established by the United States Supreme Court, we affirm the district court's dismissal of Sweeney's petition.

I

Guthrie never made it home from a fishing trip he took with Sweeney on May 28, 1991. Authorities in Clark County, Indiana, began an investigation, with Sweeney as the prime suspect. But after more than a year, detectives had failed to turn up any concrete leads—or even a body or murder weapon. The investigation quickly revived, however, after Sweeney was arrested and indicted on federal charges for placing a pipe bomb underneath the car of the lead detective in the murder investigation. Sweeney's arrest for the pipe-bomb incident, combined with drug possession charges, placed him in federal custody.

On June 26, 1992, Sweeney entered into a plea agreement with the U.S. Attorney's Office on the charges relating to the pipe bomb. In return for a promised motion for a downward departure under U.S.S.G. § 5K1.1 and the dropping of several of the federal charges, Sweeney agreed to plead guilty to planting the pipe bomb, to implicate the others who were involved in the incident, and to disclose both the whereabouts of Guthrie's body and any information relating to the cause of Guthrie's death. Prior to concluding this agreement, Sweeney's attorneys telephoned the Clark County prosecutor and asked if he would grant Sweeney use immunity for any statements he made to the federal authorities in connection with the plea agreement. What happened next is the subject of dispute. Defense counsel claims that the Clark County prosecutor orally promised to grant full use immunity, or at least suggested that he would file a murder charge only if the charge was supported by "other evidence." The prosecutor denies that any offer of use immunity was made.

What is clear, at least for our purposes, is that after this conversation, defense counsel advised Sweeney that a use immunity agreement was "carved in stone" and that Sweeney should take the deal with federal prosecutors and make as complete a statement as he could. Four days later, during a June 30 meeting with federal prosecutors and other authorities, Sweeney revealed the location of Guthrie's body and told his version of events, as follows. He and Guthrie had indeed gone fishing on May 28. On the way home from the fishing trip, the two men agreed to swap some of Sweeney's marijuana plants for a saddle owned by

Guthrie. Upon arriving at Sweeney's home, Sweeney sent Guthrie out into the woods with a shovel, two buckets, and a 9mm handgun to obtain the plants. Meanwhile, Sweeney headed into town to play bingo. When Guthrie's wife telephoned the next morning to inquire about the whereabouts of her husband, Sweeney went into the woods to search for Guthrie. He found Guthrie dead of a gunshot wound to the head. Not wanting to risk discovery of his marijuana operation, Sweeney buried Guthrie's body and disposed of his possessions.

With the benefit of this information, the police obtained and executed a search warrant and soon located Guthrie's body near Sweeney's property. Sweeney's knowledge of the location of the body was an important piece of evidence at Sweeney's subsequent trial for the murder of Guthrie. Apparently not believing the bingo story, a jury convicted Sweeney of murder. Sweeney was sentenced to 60 years' imprisonment, to be served at the conclusion of his 210-month federal sentence for the pipe bomb incident.

II

Our review of Sweeney's habeas corpus petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254, which permits a federal court to issue a writ of habeas corpus only if the state court reached a decision on the merits of a claim, and that decision was either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the

Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *see also Williams v. Taylor,* 529 U.S. 362, 405-06 (2000); *Brown v. Sternes,* 304 F.3d 677, 690 (7th Cir. 2002). Whether a state ruling runs afoul of § 2254(d)(1) is a legal determination that we review de novo. *Schaff v. Snyder,* 190 F.3d 513, 522 (7th Cir. 1999).

At the outset, we need to clarify exactly what Sweeney is presenting on appeal. The district court considered and rejected three arguments: (1) that the failure of the federal authorities to give Sweeney *Miranda* warnings before he made his June 30 proffer statement violated his Fifth Amendment right against compulsory self-incrimination with respect to the subsequent state murder charges (*see Miranda v. Arizona,* 384 U.S. 436, 444 (1966)); (2) that the statements he made to federal authorities in connection with the plea agreement were not voluntary within the meaning of the Due Process Clause because he was not adequately forewarned, whether by federal agents or his own defense counsel, that his statements could be used as evidence against him by the state authorities; and (3) that his defense attorneys' mistaken advice concerning the alleged use-immunity agreement rendered Sweeney's counsel constitutionally ineffective under the Fifth Amendment. In his brief before this court, however, Sweeney presents only the question "[w]hether Sweeney's counsel provided ineffective assistance when erroneously advising him that he had 'use immunity' and that he should cooperate with the

[federal] government and give a complete statement regarding the murder of Daniel Guthrie." Although other parts of Sweeney's brief touch upon the *Miranda* and due process claims, it is not clear whether he is trying to pursue those theories independently, or if he instead is mentioning them only in support of his ineffective assistance claim.

It would not help Sweeney even if we gave him the benefit of the doubt and treated all three issues as if they were before us, because we agree with the district court that neither the *Miranda* nor the due process claim has any merit. This is so notwithstanding several apparent missteps on the part of the courts that have already reviewed this. For instance, the Indiana Supreme Court and the district court agreed that defense counsel's advising of Sweeney of his rights prior to his making the June 30 statement to federal authorities—a fact established by substantial testimony at trial—served as a "fully effective equivalent" to the usual *Miranda* warnings. *See Miranda,* 384 U.S. at 476. No authority of which we are aware holds that a suspect's discussions with defense counsel can double for the usual warnings given by law enforcement officers; indeed, the contrary position—that whatever warnings are otherwise required by *Miranda* must be administered by the public authorities—is quite well-established. The "effective equivalent" language in *Miranda* has been limited to situations in which police officers have botched or otherwise truncated the usual warnings. *See, e.g., Duckworth v. Eagan,* 492 U.S. 195

(1989); *Richardson v. Duckworth,* 834 F.2d 1366, 1370-71 (7th Cir. 1987).

The record here shows unequivocally that Sweeney knowingly and voluntarily waived his *Miranda* rights. We evaluate that question in light of the totality of the circumstances. *See United States v. Jackson,* 300 F.3d 740, 748 (7th Cir. 2002); *United States v. Smith,* 218 F.3d 777, 780 (7th Cir. 2000). In addition,"[a] waiver need not be express, but may be inferred from the defendant's understanding of his rights coupled with a course of conduct reflecting his desire to give up his right to remain silent and have the counsel of an attorney." *Jackson,* 300 F.3d, at 748 (internal quotation marks omitted). At least three facts are relevant here: Sweeney was accompanied by defense counsel at both the June 26 and June 30 meetings; he discussed the concept of use immunity with his lawyer prior to those meetings; and he attended the June 30 meeting with federal authorities pursuant to the plea agreement and for the express purpose of making the statements he now seeks to challenge. These facts are sufficient to infer a knowing and voluntary waiver on Sweeney's part.

As for the due process claim, Sweeney has not alleged, much less proven, the coercive police activity or other governmental misconduct that is "a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly,* 479 U.S. 157, 167 (1986); *see also United*

States v. Laval, 231 F.3d 1045, 1048 (7th Cir. 2000); *Watson v. DeTella,* 122 F.3d 450, 453 (7th Cir. 1997). The Indiana Supreme Court's judgment was entirely consistent with Supreme Court decisions on the question and could in no way be characterized as "contrary to" or an "unreasonable application" of that authority.

III

That leaves Sweeney's ineffective assistance claim. The State argues that Sweeney failed to exhaust and has otherwise procedurally defaulted the claim. We can reach the merits only by first satisfying ourselves that Sweeney gave the Indiana courts a "meaningful opportunity to pass upon the substance of the claims later presented in federal court." *Chambers v. McCaughtry,* 264 F.3d 732, 737-38 (7th Cir. 2001); *see also* 28 U.S.C. § 2254(c); *O'Sullivan v. Boerckel,* 526 U.S. 838, 844 (1999). The State rests its default argument on the fact that Sweeney styled his ineffective assistance claim in the Indiana Supreme Court as a violation of the Sixth Amendment and then advanced the same claim (based on the same facts) in his habeas corpus petition under the banner of the Fifth Amendment. Of course, this substitution was important as a matter of law, since the Sixth Amendment right to counsel does not attach until the initiation of adversary judicial proceedings. *See Fellers v. United States,* 124 S.Ct. 1019, 1022 (2004); *United States v. Gouveia,* 467 U.S. 180, 187-88 (1984). The State argues that Sweeney's last-minute substitution of one amendment for the other in his habeas petition amounts to procedural default.

We disagree. Fair presentment requires a petitioner to put forward operative facts and controlling legal principles. Whether she has done so depends on several factors, including: "(1) whether the petitioner relied on federal cases that engage in constitutional analysis; (2) whether the petitioner relied on state cases which apply a constitutional analysis to similar facts; (3) whether the petitioner framed the claim in terms so particular as to call to mind a specific constitutional right; and (4) whether the petitioner alleged a pattern of facts that is well within the mainstream of constitutional litigation." *Wilson v. Briley,* 243 F.3d 325, 327 (7th Cir. 2001); *see also Verdin v. O'Leary,* 972 F.2d 1467, 1473-74 (7th Cir. 1992). The State avoids arguing the finer points of any of these factors, but since no single point is dispositive, we think greater care is necessary. It is plain that Sweeney was attempting to raise a complaint about the effectiveness of the counsel he received, given his reliance on *Strickland v. Washington,* 466 U.S. 668 (1984),and his explicit invocation of the Sixth Amendment before the Indiana Supreme Court. In his references to the *Strickland* line of cases, Sweeney explicitly relied on a range of federal cases that engage in constitutional analysis of the right to effective assistance of counsel.

We have had many occasions to consider the issue of procedural default where a § 2254 petitioner presents new factual allegations or casts her legal theories in a significantly different light than that urged in state court. On the one hand, we have found that the fact that two different claims arise from a common set of facts is not

enough to avoid default. *United States ex rel., Nance v. Fairman,* 707 F.2d 936, 941 (7th Cir. 1983); *Spurlark v. Wolff,* 699 F.2d 354, 356 (7th Cir. 1983); *Wilks v. Israel,* 627 F.2d 32, 38 (7th Cir. 1980); *Macon v. Lash,* 458 F.2d 942, 948 (7th Cir. 1972). On the other hand, "a mere variation in legal theory" does not automatically lead to a finding of failure to exhaust. *Fairman,* 707 F.2d, at 940; *see also McCaughtry,* 264 F.3d, at 738 (citing *Wilks,* 627 F.2d, at 38). Thus, a petitioner may reformulate her claims so long as the substance of the claim remains the same. *McCaughtry,* 264 F.3d, at 738 (citing *Picard v. Connor,* 404 U.S. 270, 277-78 (1971)).

Consistent with these principles, it is important that the various iterations of Sweeney's ineffective assistance claim focused throughout on defense counsel's advice regarding the alleged use-immunity agreement. As a result, this case is different from *Spreitzer v. Schomig,* 219 F.3d 639, 645 (7th Cir. 2000) and *Howard v. O'Sullivan,* 185 F.3d 721, 725 (7th Cir. 1999), where we found that petitioners who advanced ineffective assistance claims that focused alternately on sentencing and post-conviction counsel at different stages of review exhausted neither claim. This also distinguishes Sweeney's case from *Everett v. Barnett,* 162 F.3d 498, 502 (7th Cir. 1998), where we found procedural default because petitioner's ineffective assistance claim on § 2254 review centered on counsel's failure to call a particular witness whose absence had not been criticized as an instance of ineffective assistance before the state court. Here, Sweeney's underlying legal theory and the facts on which it is based have remained the same

throughout his post-conviction odyssey. This fact serves to distinguish Sweeney's situation from cases involving more dramatic shifts in the underlying legal theory. *See, e.g., Kurzawa v. Jordan,* 146 F.3d 435, 443 (7th Cir. 1998) (finding failure to exhaust where petitioner "raised two entirely new, separate due process arguments on collateral appeal"); *Fairman,* 707 F.2d, at 940-41 (finding default where petitioner brought only state-law evidentiary claims in state court, and then sought to bring constitutional claims stemming from the same facts on habeas review).

The Indiana Supreme Court had squarely before it the question whether the *Strickland* rule relating to ineffective assistance of counsel should be extended to counsel's role in Sweeney's initial set of encounters with the police and prosecutors. This is enough to preclude a finding of procedural default. *See Wilson,* 243 F.3d, at 327-28.

IV

At this point, however, Sweeney runs headlong into the AEDPA standard of review. While he was fully entitled to ask the Indiana Supreme Court to apply a *Strickland*-like standard to his claim, that court was obliged to do so only if existing U.S. Supreme Court precedent clearly established such a rule. Here, it is clear that the Supreme Court has not taken the step that Sweeney needs. Indeed, as far as we can tell, the Supreme Court has not mentioned effective assistance of counsel (in the *Strickland* sense) and the Fifth Amendment in the same breath, let alone set forth a clearly established right to that effect. To the contrary, the Court

has been at pains in the Sixth Amendment context to note that the right to counsel attaches only at the initiation of adversary criminal proceedings, and not before. *Gouveia,* 467 U.S. at 188. From there, it is a short step to the conclusion that the Indiana Supreme Court's decision cannot be called "contrary to" or "an unreasonable application of" a decision of the United States Supreme Court. *See Young v. Walls,* 311 F.3d 846, 849 (7th Cir. 2002). Thus, Sweeney's citation of Supreme Court authority that relies on the Sixth Amendment, while enough to defeat the state's claim of procedural default, is not enough to prevail on the merits under the restrictive AEDPA standard.

It might be possible to read the Supreme Court's decision in *Hill v. Lockhart,* 474 U.S. 52 (1985), as signaling the Court's willingness to extend *Strickland* to novel contexts. (The state, much to its credit, considers this possibility in its brief, though nowhere is the case mentioned by Sweeney.) *Lockhart* applied the two-part *Strickland* standard to the Court's earlier holding in *McMann v. Richardson,* 397 U.S. 759, 771 (1970), that the voluntariness of a guilty plea depends on whether the advice was within the range of competence demanded of attorneys in criminal cases. *Lockhart,* 474 U.S. at 56-57. But even the extension of the *Strickland* standard in *Lockhart* will not carry the day for Sweeney. Extrapolation from Supreme Court authority is not enough to overcome the deference to state-court decision-making built into § 2254(d). *Lockhart* or no, the operative question is whether the Supreme Court itself has established the right in

Sweeney's particular circumstances. It has not, and so we are left with the inescapable conclusion that the lack of Supreme Court authority sinks Sweeney's claim.

None of this should be read to condone the wholly inadequate performance of defense counsel in this case. Viewing the facts in nearly any light, that performance fell below an objective standard of reasonableness under any account of prevailing norms of professionalism and would easily meet both parts of the *Strickland* standard (assuming of course that it could be applied at this stage). Any lawyer worth her salt should have known that an extrajudicial agreement that has not received the imprimatur of the court is unenforceable under Indiana law, let alone "carved in stone." *See* Ind. Code § 35-37-3-3. One of Sweeney's lawyers, Michael McDaniel, actually testified at the § 2254 hearing that he inferred that there was a use-immunity agreement from the prosecutor's use of "buzz words of use immunity," but it is plain that neither he nor Sweeney's other lawyer, Edwin Sedwick, ever bothered to obtain a confirmed copy of any such agreement. Even accepting McDaniel's account of the exchange between the lawyers and Clark County prosecutors, the "agreement" that was concluded was not a watertight grant of immunity, or even a use-immunity agreement at all in any conventional sense. Use-immunity agreements are not typically contingent on a lack of further development of evidence in a case. Finally, we have no doubt that Sweeney's knowledge of the location of Guthrie's body loomed large in the minds of the jury, and so it seems clear that Sweeney could, under a more forgiving standard than AEDPA, establish prejudice.

V

We AFFIRM the judgment of the district court dismissing Sweeney's petition for a writ of habeas corpus.

In the United States Court of Appeals
For the Seventh Circuit

No. 02-2165

CHARLES E. SWEENEY, JR.,

Petitioner-Appellant,

v.

STEVE CARTER, Attorney General of Indiana,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Indiana, New Albany Division.
No. 00-72-C-B/S—**Sarah Evans Barker**, *Judge.*

April 6, 2004

Before BAUER, COFFEY, and DIANE P. WOOD, *Circuit Judges.*

ORDER

On consideration of the petitioner for rehearing and suggestion for rehearing en banc filed by counsel for the petitioner-appellant on March 22, 2004, all members of the original panel have voted to **DENY** the petition for rehearing en banc. No judge in regular active service has requested a vote on the petition for rehearing en banc.

Accordingly, the petition for rehearing and rehearing en banc is hereby **DENIED.**

In the United States Court of Appeals
For the Seventh Circuit

No. 02-2165

CHARLES E. SWEENEY, JR.,

Petitioner-Appellant,

v.

STEVE CARTER, Attorney General of Indiana,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Indiana, New Albany Division.
No. 00-72-C-B/S—**Sarah Evans Barker**, *Judge.*

August 30, 2002

Before Hon. DIANE P. WOOD, *Circuit Judge.*

ORDER

Charles Sweeney has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254, which we construe as an application for a certificate of appealability. This court has reviewed the final order of the district court and the record on appeal. We find that Sweeney has made a

substantial showing of the denial of a constitutional right as to the following issue:

> Whether Sweeney's counsel provided ineffective assistance when erroneously advising him that he had "use immunity" and that he should cooperate with the government and give a complete statement regarding the murder of Daniel Guthrie.

See McNeil v. Wisconsin, 501 U.S. 171 (1991); *Strickland v. Washington,* 466 U.S. 668 (1984); *see also* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is **GRANTED.** Finally, we appoint counsel to file an amicus brief for this appeal. A separate order will issue naming counsel and setting a briefing schedule.

In the United States Court of Appeals
For the Seventh Circuit

No. 02-2165

CHARLES E. SWEENEY, JR.,

Petitioner-Appellant,

v.

STEVE CARTER, Attorney General of Indiana,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Indiana, New Albany Division.
No. 00-72-C-B/S—**Sarah Evans Barker**, *Judge.*

October 3, 2002

Before Hon. MICHAEL S. KANNE and Hon. DIANE P. WOOD, *Circuit Judges.*

ORDER

Charles Sweeney's motion for reconsideration of this court's August 30, 2002 order granting a certificate of appealability on only one of his claims is **DENIED.** We also **DENY** Sweeney's request to hold his motion for reconsideration in abeyance.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

CHARLES SWEENEY, JR.,	)	
	)	
Petitioner,	)	
v.	)	No. NA 00-72-C-B/S
	)	
STEVE CARTER,	)	
	)	
Respondent.	)	

JUDGMENT

The court, having this day made its Entry,

IT IS THEREFORE ADJUDGED that the petitioner take nothing by his petition for a writ of habeas corpus and this action is **dismissed with prejudice.**

/s/ Sarah Evans Barker
SARAH EVANS BARKER, Judge
United States District Court

Date: February 27, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

CHARLES SWEENEY, JR.,	)	
	)	
Petitioner,	)	
v.	)	No. NA 00-72-C-B/S
	)	
STEVE CARTER,	)	
	)	
Respondent.[1]	)	

ENTRY DISCUSSING PETITION FOR WRIT OF HABEAS CORPUS

For the reasons explained in this Entry, the petition of Charles Sweeney, Jr. for a writ of habeas corpus must be **denied.**

I.

In the exercise of its *habeas* jurisdiction, a federal court may grant relief only if the petitioner shows that he is in custody "in violation of the Constitution or laws of the United States." 28 U.S.C. § 2254(a). When a habeas petition is filed after enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA) on April 24, 1996, that Act's restrictions on federal review of state court rulings apply to the case. *See Terry Williams v. Taylor,* 529 U.S. 362 120 S. Ct. 1495 (2000). Under the AEDPA, a

[1] The current Indiana Attorney General, Steve Carter, named in his official capacity only, is **substituted** as the respondent pursuant to Rule 25(d) of the *Federal Rules of Civil Procedure.*

federal court must deny a habeas petition on a claim adjudicated on the merits in state court unless the state court adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

In *Williams,* the Court definitively interpreted the revised standards of review set out in § 2254(d), holding as follows:

> [Section] 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court . . . . Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's

case.

Williams, 529 U.S. at 413, 120 S. Ct. at 1523. In addition, though

> [a] petitioner can also attack a state court's adjudication on the grounds that it is based 'on an unreasonable determination of the facts,' but such attacks are accompanied by a rigorous burden of proof: state court factual findings are presumed to be correct unless the petitioner rebuts the presumption with 'clear and convincing' evidence. [28 U.S.C.] § 2254(e)(1). . . .

Sanchez v. Gilmore, 189 F.3d 619, 623 (7th Cir. 1999).

II.

A.

On March 30, 1994, an Information was filed in the Clark Circuit Court charging Sweeney with the May 28, 1991, murder of Daniel D. Guthrie. A probable cause affidavit was also filed on March 30, 1994, supporting the State of Indiana's request for the issuance of a warrant for Sweeney's arrest. That affidavit was executed by Det. Lt. Harold Kramer of the Clark County Sheriff's Department. The affidavit recited the following: (1) a missing person report had been filed by the wife of Daniel Guthrie on May 29, 1991; (2) Lt. Kramer was assigned to that investigation; (3) during the course of his investigation a pipe bomb was placed under Lt. Kramer's police vehicle; (3) Sweeney entered into a plea agreement with federal authorities on June 26, 1992, in connection with the pipe bomb incident;

(4) on June 30, 1992, Sweeney advised federal authorities, among other things, that he had twice moved Guthrie's body and where Guthrie's body was then located; (5) Guthrie's body was thereafter found where Sweeney had indicated it was located; and (6) the cause of death of Daniel Guthrie was a single gunshot wound to the head. A warrant for Sweeney's arrest based on the foregoing as well as other information was issued on March 30, 1994. Sweeney was sentenced on the federal charges stemming from the pipe bomb incident on October 8, 1992. He was brought to Clark County from a federal facility in Kentucky and made his first court appearance in connection with the murder charge on August 17, 1994. At that time, Sweeney was appointed counsel and a trial date was set.

The information supplied by Sweeney during his interview with federal authorities on June 30, 1992, was crucial to the commencement of the State's case and to each critical aspect of the prosecution thereafter.

Through his public defender, Sweeney filed a motion to suppress on October 28, 1994. This motion to suppress was directed, in part, to the statements made by Sweeney to federal authorities on June 30, 1992, and to evidence located as a result of statements made during the course of that interview. A hearing on the motion to suppress was held on November 10, 1994. The motion to suppress was denied, the trial court finding that:

> * There was a misunderstanding between the State Prosecutor and Sweeney's federal defense team but there was no promise of or agreement to extend use

immunity to Sweeney by the Prosecutor.

* Sweeney was sufficiently informed of his right not to give a statement by virtue of the fact that his defense counsel extensively discussed the concept of use immunity with him.

* Sweeney's reliance on Indiana Rule of Evidence 410 to preclude from evidence his statement was misplaced because there was no substantive alteration of Sweeney's plea in federal court, that is, the plea agreement was merely renegotiated to better achieve the parties' wishes rather than a withdrawal of the plea as contemplated by Rule 410;

* There was no deprivation of Sweeney's right to counsel.

On December 12, 1994, the Clark Circuit Court certified its ruling on Sweeney's motion to suppress, along with one other ruling, as appropriate for an interlocutory appeal. On February 1, 1995, the Indiana Court of Appeal refused to accept Sweeney's petition for interlocutory appeal.

Various other pretrial motions were filed in the trial court. Sweeney also sought federal habeas corpus relief pursuant to 28 U.S.C. § 2241(c)(3) in a proceeding docketed as No. NA 95-197-C-B/H. This action was dismissed without prejudice on November 8, 1995. Sweeney also attempted to remove the state prosecution to federal court pursuant to 28 U.S.C. § 1446, under Cause No. NA 95-198-C-B/H, which was dismissed on November 9, 1995.

Sweeney's murder trial commenced on November 14, 1995. The jury returned its verdict of guilty on November 21, 1995. Sweeney was sentenced on December 20, 1995. The Indiana Supreme Court affirmed Sweeney's conviction and sentence in *Sweeney v. State,* 704 N.E.2d 86 (Ind. 1998), *cert. denied,* 527 U.S. 1035 (1999). The sentence imposed for his conviction for murder, which is the conviction challenged in this action, will be served upon completion of the executed portion of the federal sentence.

B.

Sweeney's habeas claims advanced here are as follows: (1) his Fifth Amendment rights against self-incrimination were violated when a statement was taken in custodial interrogation without his first receiving the *Miranda* warning that any statement could be used against him; (2) his Fifth Amendment right against self-incrimination and right to counsel were violated when he was given incorrect advice by counsel that his statements could not be used against him; and (3) his statement was not given voluntarily, because he was not forewarned that his statement could be used against him and because counsel erroneously advised him that his statement could not be used against him.

III.

A.

Sweeney's habeas claims are variations on a single theme, to-wit: he was not *Mirandized* before giving his statement to federal agents on June 30, 1992, and thus the statements were not voluntarily made and should not have

been admitted into evidence and the evidence obtained from those statements, including the locating of Guthrie's body, should not have been admitted. This becomes, as the Indiana Supreme Court noted, *Sweeney v. State,* 704 N.E.2d at 103, Sweeney's claim that the trial court erred in its November 10, 1994, ruling denying Sweeney's motion to suppress, and presents the most recent chapter in the decade-long quest by Sweeney to defeat the charge and later his conviction for the murder of Daniel Guthrie. Only § 2254(d) is implicated here, because Sweeney does not challenge the state court's adjudication on the grounds that it is based "on an unreasonable determination of the facts," as contemplated by 28 U.S.C. § 2254(d)(2). Nor does there appear to be a basis for such a § 2254(d)(2) challenge here, despite the contention that an agreement for use immunity had been reached between the Prosecutor of Clark County and Sweeney and his attorneys regarding information expected to be supplied by Sweeney during the debriefing of June 30, 1992, because state court factual findings are presumed to be correct unless the petitioner rebuts the presumption with "clear and convincing" evidence. *Id.* No such factual rebuttal has been made here, so we indulge the presumption.

On direct appeal, the Indiana Supreme Court recited the relevant facts of the case as follows:

> The federal officials offered defendant a plea agreement whereby they would recommend a sentence reduction if defendant would provide the federal officials with certain kinds of information, the most relevant to this case being the location of

> Danny Guthrie's body. After this proposal was made, defendant's attorneys telephoned the Clark County prosecutor to advise the prosecutor of the agreement which had been offered by the federal officials, and asked if the prosecutor would give the defendant "use immunity" for any statements which were provided. What happened next is disputed. Defense counsel testified that, based on the fifteen minute telephone conversation, it was absolutely clear that a use immunity agreement existed. One of the defense attorneys advised defendant that any statements he made regarding the whereabouts of Guthrie's body could not be used against him in a criminal prosecution. Defendant then provided federal officials and a Clark County detective with his recollection of the events leading up to Guthrie's death.

Sweeney, 704 N.E.2d at 103-104.

B.

We address the first question in light of the analysis required by § 2254(d)(1): whether the decision of the Indiana Supreme Court was contrary to clearly established Federal law, as determined by the Supreme Court of the United States.

The "contrary to" standard requires a state court decision to be "substantially different from the relevant precedent of [the Supreme Court]." *Williams,* 529 U.S. at 405, 120 S. Ct. 1495 (concurring opinion of Justice O'Connor). For example, a state court decision applying a

rule that contradicts the governing law set forth by the Supreme Court would qualify as "contrary to," as would a decision that involves a set of facts materially indistinguishable from a Supreme Court case that arrives at a different result. *Id.* at 405-06, 120 S. Ct. 1495. By contrast, a state court decision that draws from Supreme Court precedent the correct legal rule and applies it in a factually distinguishable situation will not satisfy the "contrary to" standard, no matter how misguided the decision's ultimate conclusion. *Id.* at 406-07, 120 S. Ct. 1495.

The Fifth Amendment to the Constitution guarantees that no person "shall be compelled in any criminal case to be a witness against himself." This guarantee is generally known as the Fifth Amendment privilege against compelled self-incrimination. This privilege is protected against abrogation by the States through the Fourteenth Amendment. *See Malloy v. Hogan,* 378 U.S. 1, 5, 84 S. Ct. 1489, 1492 (1964). As a necessary and integral component of the privilege against self-incrimination, the Supreme Court recognized in *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602 (1966), that during custodial interrogation, "the right to have counsel present . . . is indispensable to the protection of the Fifth Amendment privilege." *Id.* at 469, 86 S. Ct. at 1625.

The Miranda warnings as such are not constitutionally protected rights, but rather they are a means to insure protection of the right against self-incrimination. *Duckworth v. Eagan,* 492 U.S. 195, 203 (1989). The purpose of this prophylactic rule is to counter

the inherently coercive effects of custodial interrogations. *Miranda,* 384 U.S. at 467, 86 S. Ct. at 1624; *see also Arizona v. Mauro,* 481 U.S. 520, 529-30 107 S. Ct. 1931, 1937 (1987) (noting that purpose behind Miranda was "preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment").

In order for Sweeney to prevail in his principal claim under the "contrary to" prong of § 2254(d)(1), he must identify a decision in which the United States Supreme Court has held that statements made by, or information learned from, a person in a custodial setting, represented by counsel, could not thereafter be used by prosecuting authorities, even though neither the person's attorneys nor the interrogating officers had informed the person of the right to have counsel present before the interrogation progressed. Because Sweeney has not identified such a decision, he cannot prevail under the "contrary to" prong, of § 2254(d)(1).

C.

This leaves for consideration the issue of whether the Indiana Supreme Court's decision "involved an unreasonable application" of *Miranda* and its Supreme Court progeny. 28 U.S.C. § 2254(d)(1). A state court decision will be deemed an "unreasonable application" of clearly established federal law "if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams,* 529 U.S. at 413, 120

S. Ct. at 1523.

> When faced with the task of determining whether a particular application of Supreme Court precedent is unreasonable, we have often taken a more pragmatic approach to answering the question, scrutinizing the practical operation and effect of the principles at issue in the particular facts of the case. *See, e.g., Miller v. Anderson,* 255 F.3d 455, 456-59 (7th Cir. 2001); *Redmond v. Kingston,* 240 F.3d 590, 591-92 (7th Cir. 2001); *Washington v. Smith,* 219 F.3d 620, 627-35 (7th Cir. 2000). We ask whether the decision is "at least minimally consistent with the facts and circumstances of the case" or "if it is one of several equally plausible outcomes," *Hennon v. Cooper,* 109 F.3d 330, 335 (7th Cir. 1997); *Hall v. Washington,* 106 F.3d 742, 749 (7th Cir. 1997), granting a writ of habeas corpus if the determination is "at such tension with governing U.S. Supreme Court precedents, or so inadequately supported by the record, or so arbitrary" as to be unreasonable. *Hall,* 106 F.3d, at 749.

Boss v. Pierce, 263 F .3d 734, 741-42 (7th Cir. 2001).

The Indiana Supreme Court held that although Sweeney was in federal custody and was not advised of his Miranda rights, "under the circumstances of this case, we find that it was unnecessary for defendant to be advised of his Miranda rights." *Sweeney,* 704 N.E.2d at 104. The court's reasoning was explicated as follows:

> In *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966), the United States Supreme Court established several broad prophylactic rights in order to protect citizens interrogated while in custody. *See Allen v. State,* 686 N.E.2d 760, 769 (Ind. 1997). *Miranda* requires that defendants be advised of their right to an attorney, their right to remain silent, that their statements may be used against them in a court of law, and that the State will provide them with an attorney if they cannot afford one. *Allen,* 686 N.E.2d, at 769. "The purpose of requiring the Miranda warnings before custodial interrogation is to combat state-sanctioned coercion." *Id.* However, the warnings required by Miranda are "in the absence of a fully effective equivalent." *Miranda,* 384 U.S. at 444, 478, 86 S. Ct. 1602. *See Poulton v. State,* 666 N.E.2d 390, 392 (Ind. 1996). In this case, we believe that an equivalent to the advisement of *Miranda* rights existed. Defendant had two of his lawyers present when he provided the statements which he now wishes to suppress. Irrespective of the fact that the defense attorneys encouraged defendant to provide certain statements to federal authorities to solidify a plea agreement, certainly these attorneys advised defendant of his rights and protected defendant from being coerced by the State.

Id. at 104 (footnote omitted).

Was this decision an unreasonable application of

Miranda and its progeny from the United States Supreme Court or was it at least minimally consistent with the facts and circumstances of the case or one of several equally plausible outcomes? The following considerations influence our analysis of Sweeney's statements to authorities on June 30, 1992:

> * In its *Miranda* decision, the Supreme Court held that "[t]he warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant." 384 U.S. at 476, 86 S. Ct. at 1628. *See also Rhode Island v. Innis,* 446 U.S. 291, 297, 100 S. Ct. 1682, 1687 (1980) (referring to "the now familiar Miranda warnings . . . or their equivalent"). In *California v. Prysock,* 453 U.S. 355, 101 S. Ct. 2806 (1981) (per curiam), the Supreme Court stated that "the 'rigidity' of *Miranda* [does not] exten[d] to the precise formulation of the warnings given a criminal defendant," and that "no talismanic incantation [is] required to satisfy its strictures." *Id.,* at 359, 101 S. Ct., at 2809. Thus, satisfaction of Miranda's requirements does not turn on the precise formulation of the warnings, but rather, on whether the "warnings reasonably 'convey to [a suspect] his rights.'" *Duckworth v. Eagan,* 492 U.S. 195, 203, 109 S. Ct. 2875, 2880 (1989) (quoting *Prysock,* 453 U.S. at 361, 101 S. Ct. at 2810).
>
> * Thus, "a necessary element of compulsory self-

incrimination is some kind of compulsion." *Hoffa v. United States,* 385 U.S. 293, 304, 87 S. Ct. 408, 414 (1966). *Miranda* forbids coercion, not strategic decisions such as whether and when to speak with authorities, and what information to relate if the decision to speak is made. "Coercion is determined from the perspective of the suspect." *Illinois v. Perkins,* 496 U.S. at 296, 110 S. Ct. 2394

* As further recognized in *Miranda:* "[C]onfessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." 384 U.S. at 478, 86 S. Ct. at 1629.

* The question of a "waiver" of Sweeney's *Miranda* rights is not the relevant issue. Sweeney's right to counsel was entirely *effectuated* as his defense team negotiated a resolution of the federal charge and included in that arrangements for Sweeney to be questioned on June 30, 1992.

* Sweeney's representation by counsel before and during the interrogation of June 30, 1992, and notably the presence of both his attorneys during that entire session, was *ipso facto* the "fully effective equivalent" of Sweeney's having (1) been without counsel on that occasion, (2) been fully informed of his *Miranda* rights, and (3) knowingly waived his right to counsel before questioning proceeded. Because of the presence and active participation of Sweeney's counsel, and Sweeney's

own participation as recommended by his attorneys, the analysis of his statements extends beyond the *Miranda* warnings/waiver issue. See *United States v. Washington,* 431 U.S. 181, 188, 97 S. Ct. 1814, 1819 (1977) ("Indeed, it seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled."). Sweeney invoked his right to counsel far in advance of the debriefing session of June 30, 1992, and the Indiana Supreme Court was entirely correct when it concluded that under the circumstances of this case Sweeney's representation was the "fully effective equivalent" of *Miranda* warnings by the police. *Duckworth v. Eagan,* 492 U.S. 195, 203, 109 S. Ct. 2875, 2880 (1989) (explaining that satisfaction of Miranda does not turn on the precise formulation of the warnings, but rather, on whether the "warnings reasonably 'convey to [a suspect] his rights'") (quoting *California v. Prysock,* 453 U.S. 355, 361, 101 S. Ct. 2806, 2810 (1981)).

* To the extent that Sweeney was mislead concerning the use (or non-use) of statements he made during the debriefing of June 30, 1992, the advice nonetheless came from his attorneys. Sweeney's decision to supply information to authorities on June 30, 1992, cannot be construed as coerced in any sense. *Miranda* does not require that suspects make decisions which are ultimately in their best interests, nor does it prohibit decisions

simply because they are difficult, nor that the decisions to provide information are strategically correct.

Sweeney's Fifth Amendment *Miranda* claim thus fails to support the issuance of a writ of habeas corpus, under the "unreasonable application" prong of a § 2254(d)(1) analysis.

D.

Sweeney also contends that his statements to authorities on June 30, 1992, were not voluntary because he was mislead concerning the use for which the information he supplied could be made by the Clark County Prosecutor.

As with the *Miranda* claim discussed above, Sweeney has offered no controlling Supreme Court decision in support of his claim of error regarding whether his statements on June 30, 1992, should have been excluded from evidence because they were not voluntarily made. He also does not challenge the state court adjudication of this claim as having been based on an unreasonable determination of the facts. Accordingly, the pivotal question becomes whether the Indiana Supreme Court's resolution of the claim involved an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1).

In *Colorado v. Connelly,* 479 U.S. 157, 167, 107 S. Ct. 515, 521 (1986), the Supreme Court held that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due

Process Clause of the Fourteenth Amendment." The Supreme Court additionally held:

> There is obviously no reason to require more in the way of a "voluntariness" inquiry in the Miranda Waiver context than in the Fourteenth Amendment confession context. The sole concern of the Fifth Amendment, on which Miranda was based, is government coercion . . . . The voluntariness of a waiver of [the privilege against self-incrimination] has always depended on the absence of police overreaching, not on "free choice" in any broader sense of the word.

Connelly, 479 U.S. at 169-170, 107 S. Ct. at 523.

Factors that have been deemed relevant to a determination of voluntariness are the defendant's age, education, intelligence level, and mental state; the length of the defendant's detention; the nature of the interrogations; the inclusion of advice about constitutional rights; and the use of physical punishment, including deprivation of food or sleep. *See United States v. Brooks,* 125 F.3d 484, 492 (7th Cir. 1997). Here, there were no circumstances suggesting that Sweeney's statements on June 30, 1992, were the product of coercive police activity. To the contrary: Sweeney was in the driver's seat with respect to the information he was providing–information which solidified his plea arrangements in federal court and which he believed would not be used as a basis for any criminal prosecution under Indiana state law with respect to Daniel Guthrie. A confession is voluntary "if the totality of the

circumstances demonstrates that it was the product of rational intellect and not the result of physical abuse, psychological intimidation, or deceptive interrogation tactics calculated to overcome the defendant's free will." *Watson v. DeTella,* 122 F.3d 450, 453 (7th Cir. 1997) (citations omitted). That is precisely the character of Sweeney's statements to interrogating officers on June 30, 1992.

It is true, of course, that "[a] false promise of lenience would be an example of forbidden tactics, for it would impede the suspect in making an informed choice as to whether he was better off confessing or clamming up," *United States v. Baldwin,* 60 F.3d 363, 365 (7th Cir. 1995), *vacated and remanded on other grounds,* 517 U.S. 1231, 116 S. Ct. 1873 (1996), and the same could be said of a false promise of use immunity. But the trial court found in its ruling of November 10, 1994, that there was a "misunderstanding" concerning the existence of an agreement for use immunity, and this finding of a "misunderstanding" is inconsistent with Sweeney's argument that his incriminating statements were involuntary because of deception by the State of Indiana. Sweeney's *belief* that a use immunity agreement had been reached does not establish that such an agreement was in fact reached, and the state court's findings reflect the opposite. Sweeney's statements on June 30, 1992, thus were not involuntary, and the Indiana Supreme Court's finding that Sweeney's statements were not the product of coercion by police, *Sweeney v. State,* 704 N.E.2d, at 104, was not an unreasonable application of clearly established Federal law

as determined by the Supreme Court of the United States. Sweeney's claim of involuntariness rests on the alleged misinformation he received from his attorneys, but that misinformation, even if true, does not satisfy the constitutional test because it was not part of or the result of coercive police activity.

E.

To the extent Sweeney asserts an ineffective assistance of counsel claim, it arises under the Sixth Amendment to the Constitution. The Indiana Supreme Court considered Sweeney's claim that he had been denied effective assistance of counsel. The court, properly in our view, rejected this claim because at the time Sweeney provided statements to the authorities regarding the location of Guthrie's body, no state charges had been filed for the murder of Guthrie. The Indiana Supreme Court relied on *United States v. MacDonald,* 966 F.2d 854, 859 n.9 (4th Cir. 1992), for the proposition that if no Sixth Amendment right to counsel attaches to a proceeding, no ineffective assistance claim can be sustained. *MacDonald,* in turn, relied on *Pennsylvania v. Finley,* 481 U.S. 551, 555 (1987), for the principle that prisoners have no right to counsel in a collateral proceeding. This reasoning was not contrary to established federal law, nor was it an unreasonable application thereof; the Sixth Amendment right to counsel attaches only at the initiation of adversary criminal proceedings, *see United States v. Gouveia,* 467 U.S. 180, 188, 104 S. Ct. 2292, 2297(1984), and before proceedings are initiated, a suspect in a criminal investigation has no right under the Sixth Amendment to the assistance of

counsel. The Supreme Court has explained that "counsel's ineffectiveness will constitute cause only if it is an independent constitutional violation," *Coleman v. Thompson,* 501 U.S. at 755, 111 S. Ct. at 2552, so there could be no ineffectiveness of counsel argument predicated on the performance of counsel at a time when the Sixth Amendment right to counsel was not in effect. *Montgomery v. Meloy,* 90 F.3d 1200, 1206 (7th Cir.), *cert. denied,* 117 S. Ct. 266 (1996). We will not reverse the Indiana Supreme Court's reasonable application of United States Supreme Court precedent with regard to ineffective assistance of counsel claims.

IV.

A § 2254 claim must allege a "fundamental defect which inherently results in a complete miscarriage of justice (or) an omission inconsistent with the rudimentary demands of fair procedure." *DeBerry v. Wolff,* 513 F.2d 1336, 1338 (8th Cir. 1975) (citing *Hill v. United States,* 368 U.S. 424, 428 (1962)). "A defendant whose position depends on anything other than a straightforward application of established rules cannot obtain a writ of habeas corpus." *Liegakos v. Cooke,* 106 F.3d 1381,1388 (7th Cir. 1997). Sweeney has not succeeded in making the requisite showing in this case. Accordingly, his petition for a writ of habeas corpus is **DENIED** and this action is dismissed with prejudice. Judgment consistent with this Entry shall now issue.

IT IS SO ORDERED.

/s/ Sarah Evans Barker
SARAH EVANS BARKER, Judge
United States District Court

Date: February 27, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

CHARLES SWEENEY, JR.,	)	
	)	
Petitioner,	)	
v.	)	No. NA 00-72-C-B/S
	)	
STEVE CARTER,	)	
	)	
Respondent.	)	

ENTRY

The petitioner's notice of appeal is accompanied by his request for the issuance of a certificate of appealability.

"A certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

For the reasons stated in connection with the denial of Mr. Sweeney's petition for a writ of habeas corpus, the court finds no basis on which to conclude that he will be able to make "a substantial showing of the denial of a constitutional right" in his appeal. Accordingly, the petitioner's request for the issuance of a certificate of appealability is **denied.**

IT IS SO ORDERED.

/s/ Sarah Evans Barker
SARAH EVANS BARKER, Judge
United States District Court

Date: April 26, 2002

IN THE INDIANA SUPREME COURT

CHARLES EDWARD SWEENEY, JR.,	)
Appellant (Defendant below),	) Supreme Court No.
v.	) 10S00-9603-CR-231
STATE OF INDIANA,	)
Appellee (Plaintiff below).	)

APPEAL FROM THE CLARK CIRCUIT COURT
The Honorable Daniel F. Donahue, Judge
Cause No. 10C01-9403-CF-51

ON DIRECT APPEAL

December 18, 1998

SULLIVAN, Justice.

Defendant Charles Edward Sweeney, Jr., appeals his conviction for Murder.[1] Defendant was sentenced to 60 years. We have jurisdiction over this direct appeal because the longest single sentence exceeds 50 years. Ind. Const. art. VII, § 4; Ind.Appellate Rule 4(A)(7). We affirm

[1] Ind. Code § 35-42-1-1 (Supp. 1990).

defendant's conviction and sentence.

Background

On May 28, 1991, the victim, Danny Guthrie, left his family to go fishing with defendant. Guthrie did not return home that evening and his wife assumed that he decided to camp over with defendant. The next morning defendant called to see if Guthrie wanted to check the trout lines. Guthrie's wife informed the defendant that Guthrie never returned home and the defendant told Guthrie's wife that he brought Guthrie home between 4:00 and 6:00 p.m. the previous day. After several unsuccessful attempts to obtain more information from defendant, Guthrie's wife called the police. On May 29, 1991, Detective Kramer, the lead investigator, and other police officers questioned the defendant at his home. However, no arrest was made and Guthrie remained missing.

In February, 1992, defendant was investigated by the Bureau of Alcohol, Tobacco and Firearms for placing a pipe bomb under Detective Kramer's police car.[2] After being charged for these offenses, defendant entered into a plea agreement with the U.S. Attorney's Office on June 26, 1992. Pursuant to the plea agreement, defendant pled guilty to placing the bomb under Kramer's car, agreed to implicate

[2] Defendant claimed that he placed the bomb under Kramer's police car because Kramer had been "'hounding him' on the missing person investigation of Guthrie." (R. at 51.) As a result of placing the pipe bomb under Kramer's car, defendant was charged with the federal offenses of Attempting to Damage a Vehicle by Use of a Bomb (Title 18, U.S. Code, § 844(i)) and using a bomb in connection with a crime of violence (Title 18, U.S. Code, § 924 (c)). (R. at 19.)

all others involved in the bombing and also to disclose the whereabout of Guthrie's body and any information relating to the cause of Guthrie's death.[3] We summarize defendant's story as communicated to federal authorities as follows.[4]

According to defendant, on the return trip from the fishing expedition, defendant agreed to give Guthrie approximately 150 marijuana plants in exchange for a saddle. Immediately after arriving at defendant's home, defendant explained to Guthrie where the marijuana plants were located and provided Guthrie with a shovel, two buckets, and a 9 mm gun for protection. Defendant claimed that he then went to play bingo at the Sellersburg Moose Lodge and did not see Guthrie again that evening.[5] The next day (May 29, 1991), after Guthrie's wife claimed that Guthrie never came home, defendant alleges that he went to look for Guthrie and found him dead with a gunshot wound to the head. He also found the 9mm gun that he had given Guthrie the day before with one round missing and an empty shell casing a foot or two south of Guthrie's body. Because defendant did not want the police to discover the marijuana, he dragged Guthrie's body to a ditch located

[3] We presume that because the federal charges concerned Kramer and because Kramer had knowledge of defendant's possible role in the missing person of Guthrie, the federal plea agreement was based on defendant providing information regarding Guthrie's whereabouts.

[4] Defendant did not testify at trial nor is there a transcript of the defendant's statements to federal authorities in compliance with the plea agreement. However, several of the officers present at the time defendant provided his story testified at trial as to their recollection of defendant's statements.

[5] Mike Jones, a former Governor of the Sellersburg Moose Lodge, testified that in 1991, the Moose Lodge operated a Bingo game every Wednesday and Friday night from 7:30 to 10:00 p.m. (R. at 1520-21.) May 28, 1991, the night that defendant claimed to play bingo, fell on a Tuesday.

behind a trailer and buried the body with sweet lime and covered it with dirt and trash. He then threw the shell casings in a creek, and placed one shoe[6] and a pair of sunglasses in the burn barrel by his trailer. Defendant also buried the gun in an ammunition can near his home, but at a later date retrieved the gun and had it in his possession for personal protection. Defendant told the authorities that eventually the gun was seized from him in the State of Utah as a result of a routine traffic violation. At all times, defendant proclaimed his innocence.[7]

On July 1, 1992, the police obtained a search warrant for defendant's property and located Guthrie's body in the area described by defendant. An autopsy was performed on the body on July 2, 1992, and the medical examiner positively identified the body as that of Daniel Guthrie. The examiner also retrieved the bullet that caused Guthrie's death. The bullet and the 9mm gun that was confiscated from defendant by a Utah police officer was sent to the Bureau of Alcohol, Tobacco and Firearm Laboratory. The Bureau confirmed that the bullet that killed Guthrie had been fired from the 9mm gun belonging to the defendant.

* * * [material omitted] * * *

A jury trial was conducted on November 14, 1995, and defendant was found guilty the murder of Guthrie. The trial court sentenced defendant to 60 years to be served

[6] Defendant found Guthrie wearing only one shoe and the other shoe about 30-40 feet from the body. (R. at 1601.)

[7] While providing these statements to federal authorities, defendant indicated that he thought Guthrie was working for the police. (R. at 1312.)

upon the completion of his federal sentence of 210 months.

Additional facts will be provided as necessary.

Discussion

Defendant raises the following claims on appeal: (1) the trial court erred in denying his motion to quash the second writ of habeas corpus ad prosequendum; (2) defendant was denied his statutory and constitutional right to a speedy trial; (3) the trial court erred in refusing to suppress defendant's pre-trial statements; (4) the trial court erred in denying defendant's motion to suppress the handgun; (5) defendant was denied the right to cross-examine witnesses; (6) the trial court erred in denying the defendant credit time for pre-trial detention; (7) the trial court failed to articulate the reasons for sentencing defendant to a term of years consecutive with his federal sentence and used an improper factor to enhance defendant's sentence; (8) the trial court refused to admit certain statements provided by defendant; (9) the trial court refused to allow testimony concerning other possible reasons for the death of the victim; and (10) the State failed to establish the corpus delicti for the Murder.

* * * [material omitted] * * *

IV

Defendant contends that the trial court erred in denying his motion to suppress statements provided by him regarding the location of the victim's body. Defendant

presents three reasons supporting his claim: (1) defendant was not advised of his *Miranda* rights and the State failed to present evidence that defendant waived his Fifth Amendment rights; (2) defendant was provided with use immunity for the statements; and (3) defendant's trial counsel were ineffective for giving him the impression that he had use immunity.

As detailed in *Background, supra,* defendant was charged with two federal crimes which could have resulted in a sentence of a minimum of 30 years to a maximum of life imprisonment. The federal officials offered defendant a plea agreement whereby they would recommend a sentence reduction if defendant would provide the federal officials with certain kinds of information, the most relevant to this case being the location of Danny Guthrie's body. After this proposal was made, defendant's attorneys telephoned the Clark County prosecutor to advise the prosecutor of the agreement which had been offered by the federal officials, and asked if the prosecutor would give the defendant "use immunity" for any statements which were provided. What happened next is disputed. Defense counsel testified that, based on the fifteen minute telephone conversation, it was absolutely clear that a use immunity agreement existed. One of the attorneys advised defendant that any statements he made regarding the whereabouts of Guthrie's body could not be used against him in a criminal prosecution. Defendant then provided federal officials and a Clark County detective[32] with his recollection of the events

[32] Detective Kramer observed and listened to defendant's statements via a closed circuit television located in the interrogation room.

leading up to Guthrie's death. These facts are provided in *Background, supra.*

A

Defendant contends that because the State failed to advise him of his *Miranda* rights, the statements he provided regarding the location of the victim's body were inadmissible. The record reflects indisputable evidence that defendant was in federal custody and indeed was not advised of his Miranda rights. However, under the circumstances of this case, we find that it was unnecessary for defendant to be advised of his *Miranda* rights.

In *Miranda v. Arizona,* 384 U.S. 436 (1966), the United States Supreme Court established several broad prophylactic rights in order to protect citizens interrogated while in custody. *See Allen v. State,* 686 N.E.2d 760, 769 (Ind. 1997). *Miranda* requires that defendants be advised of their right to an attorney, their right to remain silent, that their statements may be used against them in a court of law, and that the State will provide them with an attorney if they cannot afford one. *Allen,* 686 N.E.2d, at 769. "The purpose of requiring the Miranda warnings before custodial interrogation is to combat state-sanctioned coercion." *Id.* However, the warnings required by *Miranda* are "in the absence of a fully effective equivalent." *Miranda,* 384 U.S. at 444, 478. *See Poulton v. State,* 666 N.E.2d 390, 392 (Ind. 1996). In this case, we believe that an equivalent to the advisement of *Miranda* rights existed. Defendant had two of his lawyers present when he provided the statements

which he now wishes to suppress. Irrespective of the fact that the defense attorneys encouraged defendant to provide certain statements to federal authorities to solidify a plea agreement, certainly these attorneys advised defendant of his rights[33] and protected defendant from being coerced by the State. Under these circumstances, we find no error in the State's failure to advise defendant of his *Miranda* rights.

B

Defendant next contends that even if the *Miranda* warnings were unnecessary under the circumstances of this case, the statements which defendant provided were inadmissible because they were made under the belief that the State had granted him use immunity. The trial court determined that there was a misunderstanding between the defense counsel and the State and that in fact no use immunity existed. We agree with the trial court's finding.

Use immunity is a procedural tool utilized by prosecutors to encourage or force reluctant witnesses to testify. Under Ind. Code § 35-37-3-3 (1988), only the prosecutor may request immunity for witnesses in criminal prosecutions and only the trial court may grant such immunity. *See Lucas v. State,* 499 N.E.2d 1090, 1094 (Ind. 1986).

In *Rihl v. State,* 413 N.E.2d 1046, 1053 (Ind. Ct. App. 1980), the court looked at three factors in determining whether to enforce an immunity agreement with the State: (1) the involvement of the prosecutor; (2) at least nominal

[33] One of the detectives testified that defendant's attorneys informed at least him that they had advised defendant of his rights. (R. at 715-16.)

approval by the court; and (3) some detriment to the defendant by the State's failure to abide by its bargain. The record reflects that the prosecutor was involved in discussions relating to the possibility of granting defendant use immunity. However, the prosecutor never definitively articulated that an agreement existed and that defendant would be provided immunity. During a hearing on defendant's motion to suppress certain statements, defense counsel provided the following testimony in an attempt to explain his belief that use immunity existed:

> ". . . he indicated he would prosecute Mr. Sweeney if he was able to obtain independent information which would justify the prosecution. Now my understanding of that portion of the conversation would have been that we had the use immunity agreement. . . . He did manifest an interest in prosecuting, but my understanding was it would be on the basis of discovering evidence other than that might come out of a statement from Mr. Sweeney." (R. at 608.)

On the basis of this conversation, defense counsel informed the defendant that he had use immunity for anything he said concerning the Guthrie incident. However, defense counsel did advise the defendant that this agreement was not in writing but that it was clearly his understanding that an agreement existed.[34] We agree with the trial court's finding that the prosecutor's statements do not suggest that he was offering defendant use immunity. The prosecutor was

[34] According to defense counsel, the prosecutor made it clear that they were not interested in pursuing charges relating to the bombing incident and marijuana cultivation or trafficking. (R. at 607.)

stating just the obvious -- that he would have to discover more evidence to corroborate defendant's statements rather than just solely rely on information provided by defendant. In Indiana, in order for a confession to be introduced at trial, the State must produce corroborating or independent evidence of the corpus delicti.[35] *Johnson v. State,* 653 N.E.2d 478, 479 (Ind. 1995) (citing *Willoughby v. State,* 552 N.E.2d 462, 466 (Ind. 1990)).

The record reflects no court approval or supervision of the asserted use immunity agreement. *See generally Everroad v. State,* 571 N.E.2d 1240, 1243 (Ind. 1991). Because defendant has failed to prove the first two factors, we find it unnecessary to discuss the third factor -- detriment to defendant. However, a discussion of whether defendant suffered any prejudice is set forth in detail, *infra.*

C

Defendant finally contends that, if he was not entitled to *Miranda* advisements and if use immunity was not granted, at least he was denied the effective assistance of counsel. We analyze claims of ineffective assistance of counsel according to the two-part test established in *Strickland v. Washington,* 466 U.S. 668 (1984). *See, e.g., Canaan v. State,* 683 N.E.2d 227, 229 (Ind. 1997); *Lowery v. State,* 640 N.E.2d 1031, 1041 (Ind. 1994). First, defendant must show that, in light of all the circumstances, counsel's performance was outside the wide range of professionally competent assistance. *Canaan,* 683 N.E.2d, at 229 (citing *Lowery,* 640 N.E.2d, at 1041). In order to

[35] See part XI, *infra,* concluding that the State was able to present independent evidence of corpus delicti.

make such a showing, defendant must demonstrate that counsel's performance was unreasonable under prevailing professional norms. *Id.* Second, the defendant must show adverse prejudice as a result of the deficient performance. *Id.* This requires a demonstration that counsel's performance was so prejudicial that it deprived the defendant of a fair trial. *Id.* There is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Bellmore v. State,* 602 N.E.2d 111, 123 (Ind. 1992). An appellant must present strong and convincing evidence to rebut that presumption. *Duncan v. State,* 514 N.E.2d 1252, 1253 (Ind. 1987).

Defendant's claim of ineffective assistance of counsel is based on the fact that his counsel failed to obtain a writing or recording of the grant of "use immunity." As set forth *supra,* Ind. Code § 35-37-3-3 (1988), indicates that a prosecutor must make a request for a witness to be granted use immunity and only the court can grant such a request. The record suggests that this procedure was not followed. However, we acknowledge the possibility that in some counties, familiarity and trust between the prosecutor and defense attorneys is such that at times informal agreements are entered into.[36] Indeed, in this case, the

[36] *See Everroad,* 571 N.E.2d, at 1243 (where an issue was raised concerning the existence of an immunity agreement and defendant testified that his attorney advised him that "he could trust the prosecutor therefore no written agreement would be needed"); *Bowers v. State,* 500 N.E.2d 203, 204 (Ind. 1986) (although there was no granting of "use immunity," the State did make an agreement with defendant that if defendant provided certain information the State would forego criminal charges and the Court enforced the agreement for public policy reasons).

defense attorney testified as follows: "[I] advised [defendant] that we did not have this in writing, but I had talked with the Prosecuting Attorney, it was clearly my understanding that's what the agreement was, ..." (R. at 611.) However common it may be for attorneys to engage in this informal practice of negotiating agreements, we cannot approve extra- judicial "use immunity." In fact, we presume that the legislature's mandate of court supervision for matters relating to "use immunity" and "plea bargaining" was designed to avoid the situation which has arisen here -- a misunderstanding over whether a use immunity agreement exists. For this reason, we assume, without deciding, that counsel was deficient for failing to obtain an agreement in writing.

The "constitutional guarantee of counsel under the Sixth Amendment has been construed to include four rights: the right to counsel, the right to effective assistance of counsel, the right to a preparation period sufficient to ensure a minimal level of quality of counsel, and the right to be represented by counsel of one's own choice." *United States v. McCutcheon,* 86 F.3d 187, 189 (11th Cir. 1996) (citations omitted). The Sixth Amendment right to counsel attaches when "a prosecution is commenced, that is, 'at or after the initiation of adversary judicial criminal proceedings -- whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *McNeil v. Wisconsin,* 501 U.S. 171, 175 (1991). In *United States v. Alvarez,* No. 97-4061, 142 F.3d 1243, 1998 WL 207912 (10th Cir. 1998), the defendant, after meeting with a court-appointed attorney at his request, made several

incriminating statements to DEA agents in the hope that he would receive a reduced sentence for his cooperation. After being convicted, the defendant claimed his counsel was ineffective for various reasons. The court determined that defendant had no Sixth Amendment right to effective assistance of counsel at the time he was questioned because the government had not initiated formal proceedings. Additionally, the Supreme Court has determined that the Sixth Amendment right to counsel is "offense specific." *McNeil,* 501 U.S. at 175. The right "cannot be invoked once for all future prosecutions." *Id.* "[T]o exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities. . . ." *Id.* at 175-76 (quoting *Maine v. Moulton,* 474 U.S. 159, 179-80 (1985)).

In this case, although federal charges had been filed, the State had not yet filed charges for the murder of Guthrie. Consequently, defendant's Sixth Amendment right to counsel and, thus, his right to the effective assistance of counsel had not attached when he provided statements regarding the location of Guthrie's body. *See United States v. MacDonald,* 966 F.2d 854, 859 n.9 (4th Cir. 1992) (where no Sixth Amendment right to counsel attaches to the proceeding, an ineffective assistance claim cannot be sustained).

* * * [material omitted] * * *

Conclusion

We affirm defendant's conviction and sentence.

SHEPARD, C.J., and DICKSON, SELBY, and BOEHM, JJ., concur.

Supreme Court, U.S.
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(2)

No. 04-326

In the Supreme Court of the United States

CHARLES E. SWEENEY, JR., PETITIONER

v.

STEVE CARTER, ATTORNEY GENERAL OF INDIANA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the court of appeals correctly determine that this Court has not "clearly established" that the right to effective assistance of counsel under the Sixth Amendment as explained in *Strickland v. Washington*, 466 U.S. 668 (1984), extends to the right to counsel at police interrogations under the Fifth Amendment pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966)?

2. Did the court of appeals improperly: a) decide two issues as to which it had not granted a certificate of appealability; and b) deny a certificate of appealability on Sweeney's argument that his statements were improperly admitted at trial because police did not advise him of his *Miranda* rights?

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In the Supreme Court of the United States

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STEVE CARTER, ATTORNEY GENERAL OF INDIANA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at *Sweeney v. Carter*, 361 F.3d 327 (7th Cir. 2004), *reh'g and reh'g en banc denied*. The order of the district court (Pet. App. A21-A41) is unreported. The opinion of the Indiana Supreme Court on Sweeney's direct appeal (Pet. App. A44-A57) is reported at *Sweeney v. State*, 704 N.E.2d 86 (Ind. 1998), *cert. denied*, 527 U.S. 1035 (1999).

JURISDICTION

The judgment of the court of appeals was entered on March 15, 2004. A petition for rehearing was denied on April 6, 2004. Pet. App. A15-A16. The petition for a writ of certiorari was filed on September 3, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Sweeney, a prisoner currently serving a federal sentence but subject to continued future imprisonment by the State of Indiana, seeks a writ of habeas corpus from his 60-year sentence for his 1995 Clark County, Indiana conviction for murder.

1. The underlying facts

On direct appeal, the Indiana Supreme Court recited the following facts relating to Sweeney's claims:

> On May 28, 1991, the victim, Danny Guthrie, left his family to go fishing with defendant. Guthrie did not return home that evening and his wife assumed that he decided to camp over with defendant. The next morning defendant called to see if Guthrie wanted to check the trout lines. Guthrie's wife informed the defendant that Guthrie never returned home and the defendant told Guthrie's wife that he brought Guthrie home between 4:00 and 6:00 p.m. the previous day. After several unsuccessful attempts to obtain more information from defendant, Guthrie's wife called the police. On May 29, 1991, Detective Kramer, the lead investigator, and other police officers questioned the defendant at his home. However, no arrest was made and Guthrie remained missing.
>
> In February, 1992, defendant was investigated by the Bureau of Alcohol, Tobacco and Firearms for placing a pipe bomb under Detective Kramer's police car. After being charged for these offenses, defendant entered into a plea agreement with the U.S. Attorney's Office on June 26, 1992. Pursuant to the plea agreement, defendant pled guilty to placing the bomb under Kramer's car, agreed to implicate all others involved in the bombing and also to disclose the whereabouts of Guthrie's body and any information relating to the cause of

Guthrie's death. We summarize defendant's story as communicated to federal authorities as follows.

According to defendant, on the return trip from the fishing expedition, defendant agreed to give Guthrie approximately 150 marijuana plants in exchange for a saddle. Immediately after arriving at defendant's home, defendant explained to Guthrie where the marijuana plants were located and provided Guthrie with a shovel, two buckets, and a 9 mm gun for protection. Defendant claimed that he then went to play bingo at the Sellersburg Moose Lodge and did not see Guthrie again that evening. The next day (May 29, 1991), after Guthrie's wife claimed that Guthrie never came home, defendant alleges that he went to look for Guthrie and found him dead with a gunshot wound to the head. He also found the 9mm gun that he had given Guthrie the day before with one round missing and an empty shell casing a foot or two south of Guthrie's body. Because defendant did not want the police to discover the marijuana, he dragged Guthrie's body to a ditch located behind a trailer and buried the body with sweet lime and covered it with dirt and trash. He then threw the shell casings in a creek, and placed one shoe and a pair of sunglasses in the burn barrel by his trailer. Defendant also buried the gun in an ammunition can near his home, but at a later date retrieved the gun and had it in his possession for personal protection. Defendant told the authorities that eventually the gun was seized from him in the State of Utah as a result of a routine traffic violation. At all times, defendant proclaimed his innocence.

On July 1, 1992, the police obtained a search warrant for defendant's property and located Guthrie's body in the area described by defendant. An autopsy was performed on the body on July 2,

> 1992, and the medical examiner positively identified the body as that of Daniel Guthrie. The examiner also retrieved the bullet that caused Guthrie's death. The bullet and the 9mm gun that was confiscated from defendant by a Utah police officer was sent to the Bureau of Alcohol, Tobacco and Firearm Laboratory. The Bureau confirmed that the bullet that killed Guthrie had been fired from the 9mm gun belonging to the defendant.

Pet. App. A45-A47 (footnotes omitted). Further, the Indiana Supreme Court recited additional facts surrounding Sweeney's giving his statement to federal authorities as follows:

> [F]ederal officials offered defendant a plea agreement whereby they would recommend a sentence reduction if defendant would provide the federal officials with certain kinds of information, the most relevant to this case being the location of Danny Guthrie's body. After this proposal was made, defendant's attorneys telephoned the Clark County prosecutor to advise the prosecutor of the agreement which had been offered by the federal officials, and asked if the prosecutor would give the defendant "use immunity" for any statements which were provided. What happened next is disputed. Defense counsel testified that, based on the fifteen minute telephone conversation, it was absolutely clear that a use immunity agreement existed. One of the attorneys advised defendant that any statements he made regarding the whereabouts of Guthrie's body could not be used against him in a criminal prosecution. Defendant then provided federal officials and a Clark County detective with his recollection of the events leading up to Guthrie's death.

Pet. App. A49-A50 (footnote omitted).

2. The state court proceedings

The State of Indiana charged Sweeney with Guthrie's murder. A jury found Sweeney guilty and the state trial court sentenced Sweeney to 60 years imprisonment to be served upon the completion of his federal sentence of 210 months. Pet. App. A47-A48.

On direct appeal, Sweeney argued, in pertinent part, that: 1) his statement to federal authorities should have been suppressed because it was given absent *Miranda* warnings; 2) his statement should have been suppressed because it was given pursuant to a use immunity agreement with state prosecutors; and 3) his counsel rendered ineffective assistance of counsel in the state case by erroneously advising Sweeney during the federal case plea bargain negotiation that a use immunity agreement with state prosecutors had been reached.

The Indiana Supreme Court rejected these arguments and affirmed Sweeney's conviction. Specifically, the state supreme court held, respectively, that: 1) Sweeney had received the equivalent of *Miranda* warnings by having two attorneys present during the federal case plea bargain negotiation who advised Sweeney of his rights and told investigators that they had done so; 2) no use immunity agreement existed between Sweeney and state prosecutors; and 3) Sweeney had no right to the effective assistance of counsel in the state case under the Sixth Amendment before any state charges were filed. Pet. App. A50-A56.

Sweeney filed a petition for a writ of certiorari in this Court. This Court denied the petition. *Sweeney v. Indiana*, 527 U.S. 1035 (1999) (order) (No. 98-1462).

3. The federal habeas corpus proceedings

Sweeney filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Southern District of Indiana. Among other claims, Sweeney argued that: 1) his statement should have been suppressed given the absence of *Miranda*

warnings; 2) his statement was involuntarily given; and 3) he received the ineffective assistance of counsel because his attorneys erroneously advised him during the federal case plea bargain negotiation regarding use immunity in state court. The district court denied the petition, finding that the Indiana Supreme Court's adjudication of these claims were neither contrary to or involved an objectively unreasonable application of clearly established federal law. Pet. App. A30-A36, A39-A40. The district court denied a certificate of appealability (COA). Pet. App. A42.

The United States Court of Appeals for the Seventh Circuit granted a COA as to Sweeney's ineffective assistance of counsel claim. Pet. App. A17-A18. The court of appeals denied his motion to reconsider its inherent denial of a COA on his *Miranda* and voluntariness claims. Pet. App. A19. Sweeney sought a writ of certiorari in this Court requesting review of the inherent denial of a COA on his *Miranda* and voluntariness claims, which this Court denied. *Sweeney v. Carter*, 538 U.S. 922 (2003) (order) (No. 02-2165).

The court of appeals later affirmed the denial of Sweeney's habeas petition. Pet. App. A1-A14. Sweeney's argument on appeal was that he was denied a right to effective assistance of counsel under the Fifth Amendment. Pet. App. A2. The court of appeals rejected the State's argument that Sweeney had committed procedural default by relying solely on the Sixth Amendment in his arguments to the state supreme court and failing to assert his Fifth Amendment counsel claim. Pet. App. A8-A11. However, the court of appeals held that because this Court has never clearly established a right to effective assistance of counsel before the initiation of a criminal proceeding, the Indiana Supreme Court's adjudication of the counsel claim was neither contrary to nor involved an unreasonable application of clearly established federal law necessitating relief. Pet. App. A11-A14. The court of appeals also discussed—and rejected—Sweeney's corollary arguments regarding

Miranda rights and voluntariness of the statement. Pet. App. A5-A8. The court of appeals denied Sweeney's petition for rehearing and rehearing *en banc*. Pet. App. A15-A16.

ARGUMENT

I.

The court of appeals properly rejected Sweeney's claim under the Fifth Amendment of ineffective assistance of counsel at a pre-charge plea negotiation.

This Court should deny Sweeney's petition for a writ of certiorari because the court of appeals properly adjudicated his Fifth Amendment ineffective assistance of counsel claim. First, Sweeney's claim is barred by procedural default. Second, Sweeney's proposed rule is not "clearly established" under the meaning of 28 U.S.C. § 2254(d)(1). The petition should be denied.

A.

Sweeney's ineffective assistance of counsel claim is barred by procedural default for failing to present his current argument to the Indiana Supreme Court.

Sweeney's argument to the Indiana Supreme Court regarding the effectiveness of his counsel never referenced, let alone relied upon, a Fifth Amendment basis for the claim. Indeed, Sweeny limited his argument at that time to the Sixth Amendment and the standard announced in *Strickland v. Washington*, 466 U.S. 668 (1984). Opp. App. 1a-2a. This failure results in a procedural default on federal habeas review. *Baldwin v. Reese*, 541 U.S. ___, 124 S. Ct. 1347, 1351 (2004).

The court of appeals erred in concluding that although Sweeney did not tell the state courts that he believed that counsel's acts violated the Fifth Amendment, his reference to the Sixth Amendment was sufficient to preserve the Fifth Amendment argument for federal

habeas. Pet. App. A8-A9. This is in part because the court of appeals found that Sweeney "explicitly relied on a range of federal cases that engage in constitutional analysis of the right to effective assistance of counsel." Pet. App. A9. The court of appeals believed this despite the plain language of Sweeney's principal brief to the Indiana Supreme Court[1] that cited only *Strickland* and not a "range of federal cases." Opp. App. 1a-2a. The conclusion to his argument explicitly stated that he was entitled to relief under *Strickland*. Opp. App. 2a. In the court of appeals' belief, Sweeney was not required to make the same legal argument in both state and federal courts because the factual basis for the two claims are the same. Pet. App. A10. This logic was rejected last term in *Baldwin*.

Baldwin held that a habeas petitioner commits procedural default when he does not explicitly tell the state's highest court the federal basis for a claim. *Baldwin*, 124 S. Ct. at 1351. In that case, the habeas petitioner only alleged "ineffective assistance of counsel" in his brief to the Oregon Supreme Court but did not cite any federal basis for the claim. *Id.* at 1350. *Baldwin* was decided after the court of appeals decided this case.

The State recognizes that Sweeney did at least cite a federal basis for his counsel claim, but that does not solve the problem here. Sweeney's entire argument in his principle direct appeal brief (Opp. App. 1a-2a) was based on *Strickland* and the Sixth Amendment, which, as the Indiana Supreme Court (and even the court of appeals) observed, requires first that a criminal proceeding be initiated. Sweeney did not address the counsel claim in his direct appeal reply brief. Now, Sweeney admits that the Sixth Amendment does not apply here but instead the state courts should have found a violation of the Fifth

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[1] Sweeney's direct appeal was taken directly to the Indiana Supreme Court who, at that time, had sole jurisdiction over the appeal because Sweeney's sentence was in excess of 50 years. Ind. Const. Art. 7, § 4 (1996).

Amendment (which, so the argument goes, does not require the initiation of a criminal proceeding). But nowhere did Sweeney alert the Indiana Supreme Court that it should analyze his claim in such a manner. This "bait and switch" is exactly the problem that *Baldwin* and the fair presentment requirement intend to prevent.

If a defendant believes that he is entitled to federal habeas relief under one legal theory but explicitly limited his arguments to the state courts to a different theory, his habeas claim is forfeited. The principles of comity and federalism that underlie the exhaustion and procedural default rules logically require no less. *Id.* at 1349. Sweeney has violated those principles and habeas review should be barred. This Court should deny the petition.

B.

This Court has not clearly established a Fifth Amendment right to effective assistance of counsel prior to the initiation of a criminal proceeding.

Sweeney's procedural default notwithstanding, the court of appeals properly denied habeas relief on the merits because this Court has not "clearly established" the principle upon which he now relies: that the Fifth Amendment requires that counsel provided during a custodial interrogation must render effective assistance or the evidence obtained pursuant to the interrogation is inadmissible at a later trial. Whether such a rule is wise or otherwise desirable is beside the point; Sweeney is not entitled to habeas relief because 28 U.S.C. § 2254(d) precludes relief unless the state courts' adjudication was contrary to or involved an unreasonable application of clearly established federal law as determined by this Court. *Williams v. Taylor*, 529 U.S. 362, 402-03 (2000).

This Court has not discussed the meaning of the "clearly established" requirement. Still, all of the circuits are in agreement that at the very least this Court must have explicitly found a right to exist. *See* 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice*

and Procedure § 32.3 n.10 (4th Ed. 2001 & Supp. 2003) (hereinafter "Hertz & Liebman") (compiling cases). *See also Early v. Packer*, 537 U.S. 3, 10 (2002) (per curiam) (court of appeals erred in granting habeas relief on ground that state court decision was contrary to Supreme Court decisions that were only based on the Court's supervisory power over the federal courts and did not establish constitutional rights). Congress must have intended "clearly established" to mean something more than "potential," "possible," or even "suggested."

"Clearly" has been defined as "without doubt or question" and "establish" has been defined as "to settle or fix after consideration." Webster's Third New International Dictionary Unabridged (1993). Professors Hertz and Liebman have noted that Congress intended the clearly established requirement to keep federal courts from invalidating state decisions based on rules of recent creation that did not exist at the time of the state court adjudication. Hertz & Liebman, § 32.3 n.11 (quoting portions of the Congressional Record).

Whatever the precise contours of the "clearly established" requirement, Sweeney's proposed rule has not been so defined. If this Court had done so, Sweeney (and the state and federal courts) could have easily pointed to such a rule and considered Sweeney's argument in light of that law. While Sweeney provides an argument for creating a right to the effective assistance of counsel at pre-charge interrogations, he does not point to any clearly established rule. Sweeney's own argument belies his assertion that the legal basis for his claim is clearly established: "It must be conceded that there is no decision of this Court specifically addressing an ineffective assistance of counsel claim in the Fifth Amendment context." Pet. 10.

The State agrees with the court of appeals on this point:

> While [Sweeney] was fully entitled to ask the Indiana Supreme Court to apply a *Strickland*-like

> standard to his claim, that court was obliged to do so only if existing U.S. Supreme Court precedent clearly established such a rule. Here, it is clear that the Supreme Court has not taken the step that Sweeney needs. Indeed, as far as we can tell, the Supreme Court has not mentioned effective assistance of counsel (in the *Strickland* sense) and the Fifth Amendment in the same breath, let alone set forth a clearly established right to that effect. To the contrary, the Court has been at pains in the Sixth Amendment context to note that the right to counsel attaches only at the initiation of adversary criminal proceedings, and not before. From there, it is a short step to the conclusion that the Indiana Supreme Court's decision cannot be called "contrary to" or "an unreasonable application of" a decision of the United States Supreme Court.

Pet. App. A11-A12. Not only is Sweeney's proposed rule not clearly established, but the Indiana Supreme Court cannot be said to have been objectively unreasonable for failing to invent such a right. The lower federal courts properly denied Sweeny's petition for a writ of habeas corpus.

Even if this Court were inclined to establish such a rule, it would be inappropriate to do so here where it could not retroactively provide a basis for habeas relief. *Teague v. Lane*, 489 U.S. 288, 315-16 (1989). This Court should decline invitations like Sweeney's until a case on direct appeal provides an appropriate opportunity. Sweeney's petition should be denied.

II.
The court of appeals properly addressed Sweeney's other arguments surrounding the admissibility of his statement to authorities.

This Court should deny the petition for a writ of certiorari because the court of appeals properly discussed Sweeney's additional arguments that go to the

admissibility of his statement. Sweeney invited the court of appeals to address these issues in his brief, so he cannot be heard to complain that it actually discussed them in its opinion. Furthermore, no reasonable jurists could debate that the district court correctly denied habeas relief on Sweeney's *Miranda* argument. The petition should be denied.

A.
The court of appeals did not deprive Sweeney of due process by discussing his arguments that were corollary to his counsel argument.

To the extent that the court of appeals discussed the merits of Sweeney's *Miranda* and voluntariness of his statement claims, it was only because Sweeney's brief to the court of appeals repeatedly made those arguments. The court of appeals prefaced its discussion, "Although other parts of Sweeney's brief touch upon the *Miranda* and due process claims, it is not clear whether he is trying to pursue those theories independently, or if he instead is mentioning them only in support of his ineffective assistance claim." Pet. App. A6. Thus, the court of appeals briefly considered Sweeney's argument in a thorough attempt to avoid Sweeney complaining to this Court that his arguments were not fully considered. Now Sweeney claims that he should have been able to brief those claims more fully. Sweeney cannot, as the saying goes, have his cake and eat it too.

Sweeney has no right in due process jurisprudence to any particular quality of briefing in federal habeas proceedings. The court of appeals has explained that a habeas petitioner may brief claims that are in addition to those specified in a COA if he wants the court to consider expanding the COA.[2] *Porter v. Gramley*, 112 F.3d 1308,

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[2] This is in large part because, in the Seventh Circuit, the judges on the panel that decides an appeal are not necessarily the same judges on the motions panel who considered the request for the COA. Seventh

1312 (7th Cir. 1997). It was reasonable for the court of appeals to question Sweeney's motive for arguing the additional issues, especially in light of his extensive pervious efforts to expand the COA. The solution, therefore, was to briefly discuss those arguments and explain why Sweeney was not entitled to any relief based upon them. The court of appeals did not err in choosing to indulge, however briefly, Sweeney's apparent invitation to consider those claims. This Court should deny the petition.

B.

The court of appeals properly denied a certificate of appealability on Sweeney's *Miranda* claim.

Sweeney was not entitled to a COA on his *Miranda* claim. To obtain a COA, the habeas petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). To do so, the habeas petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2001) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). Sweeney has not met his burden.

First, Sweeney has already unsuccessfully sought a writ of certiorari on this issue and as such, this argument should be deemed *res judicata*. *Sweeney*, 538 U.S. 922 (2003) (order) (No. 02-2165). Sweeney argues (Pet. 20 n.5) that *Banks v. Dretke*, 540 U.S. 668, 124 S. Ct. 1256 (2004), requires COA applicants to wait until after complete consideration of the appeal by the court of appeals before seeking a writ of certiorari on the COA expansion question. *Banks* does not stand for that proposition. The Fifth Circuit in *Banks* followed the same procedure it

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Circuit Operating Procedures 1(a)(1), http://www.ca7.uscourts.gov/Rules/rules.htm#opproc1 (last accessed October 20, 2004).

used in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), where it made the COA determination at the same time it issued a decision on the merits. *Banks*, 124 S. Ct. at 1270-71. Thus, Banks sought certiorari review of the COA determination at the first available opportunity and this Court determined that a COA should have issued. *Id.* at 1280. Here, however, Sweeney has already requested certiorari review on this question and this Court denied the petition. This Court should not consider this argument a second time. To do so would just encourage a waste of judicial resources below.

Sweeney begins his argument (Pet. 16-21) by discussing why the court of appeals is wrong to not consider the issuance of a COA as a jurisdictional prerequisite. It is true that this Court in *Miller-El* stated that a COA is jurisdictional. *Miller-El*, 537 U.S. at 335-36. The State agrees with Sweeney that the line of cases in the Seventh Circuit that disagree have been abrogated by *Miller-El*. However, that is not the question here. The only question is whether the court of appeals should have issued a COA on Sweeney's *Miranda* claim.

The court of appeals' brief discussion of the *Miranda* claim shows that no jurists of reason would find the district courts' denial of this claim to be debatable or wrong. Although the court of appeals disagreed with the district court and the Indiana Supreme Court over the applicability of the "effective equivalent" exception to the requirement that police give *Miranda* advisements, "[t]he record here shows unequivocally that Sweeney knowingly and voluntarily waived his *Miranda* rights." Pet. App. A6-A7. Law enforcement did not initiate the questioning here and nor was it a typical interrogation in a coercive environment. Sweeney was accompanied by two attorneys who had brokered a deal with federal prosecutors that he would give a statement in exchange for a favorable sentencing recommendation. Pet. App. A7, A51. As the Indiana Supreme Court observed, the federal law enforcement agents to whom Sweeney made his

statement did not give the *Miranda* advisements only because Sweeney's counsel told them that they had done so. Pet. App. A51 n.33. Sweeney and his attorneys knew of his *Miranda* rights and Sweeney purposefully, knowingly, and voluntarily waived those rights in order to benefit from the plea agreement. Sweeney's statement was not given in the sort of coercive environment that *Miranda* advisements discourage. *See Arizona v. Mauro*, 481 U.S. 520, 529-30 (1987) (noting that the purpose of *Miranda* was "preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment").

Whether a defendant waived his rights is evaluated under the totality of the circumstances and can be inferred by a course of conduct that reflects a desire to give up his rights. *Fare v. Michael C.*, 442 U.S. 707, 724 (1979). Sweeney was counting on his statement being knowing, intelligent, and voluntary so he could obtain the benefits of the plea agreement. Sweeney's desire for a use immunity agreement before talking to authorities belies his claim that he didn't fully know that his statements could be used against him. *Miranda* does not require law enforcement to warn suspects of the consequences of bad advice from counsel. Sweeney knowingly, intelligently, and voluntarily waived his *Miranda* rights because doing so was the only way to reap the benefits of a plea agreement.

Moreover, any error in the admission of Sweeney's statement to federal officials was harmless. A habeas petitioner cannot obtain a writ of habeas corpus unless he can show that the state court's error "had a substantial and injurious effect or influence on the jury's verdict."[3] *Brecht v. Abrahamson*, 507 U.S. 619, 627 (1993). The "fruit of the poisonous tree" doctrine has not been applied by this Court to exclude other evidence obtained from

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[3] Sweeney does not even attempt to show that any error was not harmless despite his burden to do so.

information gleaned from statements obtained in violation of *Miranda*. Sweeney's statement was not a confession as he maintained his innocence throughout. But, Sweeney was the last person to be seen with the victim, the victim was buried on Sweeney's property, and had been shot with Sweeney's gun (which was later confiscated from Sweeney by Utah police in an unrelated incident). If anything, Sweeney's statement was testimony that attempted to explain away the circumstantial evidence against him. The jury may have chose to disbelieve his story, but Sweeney cannot show that his statement has a substantial and injurious effect on the verdict.

The court of appeals properly denied a COA on Sweeney's *Miranda* claim. No reasonable jurist could debate that the district court erred in rejecting Sweeney's argument. This Court should deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorney General

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Section Chief and
Deputy Attorney General

OCTOBER 2004

APPENDIX A

IN THE INDIANA SUPREME COURT
CAUSE NO. 10S00-9603-CR-00231

CHARLES EDWARD SWEENEY, JR.
Appellant (Defendant Below)
VS.
STATE OF INDIANA
Appellee (Plaintiff Below)

APPEAL FROM THE CLARK CIRCUIT COURT
THE HONORABLE DANIEL F. DONAHUE, JUDGE

BRIEF OF APPELLANT

* * *

IV. SWEENEY'S STATEMENT REGARDING THE LOCATION OF GUTHRIE'S BODY SHOULD BE SUPPRESSED.

* * *

C. SWEENEY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

Alternatively, Sweeney was denied effective assistance of counsel when his attorney allowed him to make a statement regarding the location of Guthrie's body while under the impression Sweeney had been granted "use immunity" in the murder investigation. (R. p. 611).

McDaniel's and Sedwick's allowing Sweeney to give the statement regarding Guthrie's body, without first obtaining a writing or recording of the grant of "use immunity", was an unreasonable decision denying Sweeney effective assistance of counsel. Indeed, in Indiana, use immunity cannot even be granted by the Prosecutor, but only by the Court. IND. CODE ANN. 35-37-3-3(a) (West 1981).

To succeed on a 6th Amendment claim of ineffective assistance of counsel, one must satisfy the performance-

prejudice standard set forth in Strickland v. Washington, (1984), 466 U.S. 668, 104 S.Ct. 2052, 86 L.Ed.2d 674. The performance component requires the appellant to show that counsel's performance was deficient. The standard is reasonably effective assistance, which is objectively measured by prevailing professional norms. The prejudice component requires one to show that counsel's unreasonable performance not only prejudiced the defense, but also that this prejudice undermined the reliability and fairness of the proceeding. Stanley v. State, (1985) Ind., [4]79 N.E.2d 1315, 1317.

Both components are met in this case. The conduct of Sweeney's attorneys was deficient and that deficiency greatly prejudiced the defense. It was unreasonable for McDaniel and Sedwick to convey the impression that an immunity agreement had been reached when there was nothing reduced to writing, there was no recording showing that any agreement existed between the defense and the State and no request had been made of the trial court for immunity. Sweeney was unable to make an "informed decision" to give his statement because of his attorney's faulty representations regarding his immunity. Having attorneys who allow and encourage one to give self-incriminating statement in a murder investigation without first obtaining a recording of the use immunity agreement approved by the court is tantamount to having no attorney at all. Allowing the statement to be made denied Sweeney's right to a fair trial because without the statement, there was not enough evidence to prosecute Sweeney, much less convict him. In fact, McDaniel was not concerned about the possibility of the murder charge. (R. p. 711). He was also told that Sweeney could have given the body's location through his attorney without giving a statement, but McDaniel encouraged Sweeney to cooperate. (R. p. 611, 614). Sweeney is entitled to relief under Strickland and the 6th Amendment to the United States Constitution for ineffective assistance of counsel.

(3)

No. 04-326

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CHARLES E. SWEENEY, JR.,

Petitioner,

v.

STEVE CARTER,
Attorney General of Indiana,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

I. THIS COURT SHOULD GRANT THE WRIT TO ADDRESS PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

A. Petitioner's claim is not procedurally defaulted.

Respondent failed to convince the District Court or the Court of Appeals that Petitioner's ineffective assistance of counsel claim has been defaulted. The Court of Appeals considered Respondent's procedural default argument and rejected it after an extensive discussion. *Sweeney v. Carter,* 361 F.3d 327, 332-33 (7th Cir. 2004); Pet. App. A8-A11. Similarly, the District Court did not rely on procedural default but instead addressed the merits of the issue. Pet. App. A39-A40.

Respondent relies exclusively on this Court's opinion in *Baldwin v. Reese,* 541 U.S. __, 124 S.Ct. 1347 (2004), to support the argument that Petitioner's claim has been defaulted. Brief in Opposition [hereinafter "Br. Opp."] at 7-9. *Baldwin* is inapposite. In *Baldwin,* the habeas petitioner failed to cite "any case that might have alerted the court to the alleged federal nature of the claim" and failed to provide the highest state court with *any* "factual description supporting the claim." 541 U.S., at __, 124 S.Ct., at 1351.

Here, as the Court of Appeals found, Petitioner's "underlying legal theory and the facts on which it is based have remained the same throughout his post-conviction

odyssey." *Sweeney, supra,* 361 F.3d, at 333; Pet. App. A10-A11. In the Indiana Supreme Court (as in the District Court, Court of Appeals, and this Court) Petitioner urged application of the ineffective assistance of counsel test of *Strickland v. Washington,* 466 U.S. 668 (1984) to evaluate the constitutional implications of his attorneys' false assurance of immunity and resultant sixty-year prison sentence. "[Petitioner] gave the Indiana courts a 'meaningful opportunity to pass upon the substance of the claims later presented in federal court.'" *Sweeney, supra,* 361 F.3d, at 332; Pet. App. A8 (citing, *inter alia, O'Sullivan v. Boerckel,* 526 U.S. 838, 844 (1999)).

B. The constitutional predicate for Petitioner's claim of ineffective assistance of counsel is "clearly established."

Habeas corpus relief is foreclosed unless the state court determination of a petitioner's claim was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Respondent wrongly asserts that this Court "has not discussed the meaning of the 'clearly established' requirement." Br. Opp. 9.

In *Williams v. Taylor,* 529 U. S. 362 (2000), this Court explained that the "clearly established law" requirement of § 2254(d)(1) "codifies *Teague* [*v. Lane,* 489 U.S. 288 (1989)] to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final." 529 U.S., at 380. This Court's *Teague* jurisprudence holds the inquiry as to whether a constitutional rule is "new" (i.e. not "clearly established") is "whether the

Constitution, as interpreted by the precedent then existing [at the time of the state court decision], compels the rule." *Beard v. Banks,* __ U.S. __, __, 124 S.Ct. 2504, 2510 (2004) (citing *Saffle* [*v. Parks,* 494 U. S. 484, 488 (1990)]).

In *Williams,* this Court further clarified that "rules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule." *Id.,* at 382. "Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent." *Id.* (quoting *Wright v. West,* 505 U. S. 277, 308-309 (1992) (Kennedy, J., concurring)).

These authorities, ignored by Respondent, lead inescapably to the conclusion that Petitioner's claim is supported by "clearly established" law. This Court has stated in no uncertain terms that the "right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson,* 397 U.S. 759, 771, n. 14 (1970). And this Court has, in *Strickland, supra,* announced a rule of "general application ... designed for the specific purpose of evaluating a myriad of factual contexts" for evaluating when the right to the effective assistance of counsel is abrogated. *Williams, supra,* 529 U.S., at 382.

Contrary to Respondent's assertions, Petitioner is not asking to "create" or "invent" or "establish" a Fifth Amendment right to effective assistance of counsel. Br. Opp. 10, 11. This Court's precedent "compels the rule." *Beard v. Banks, supra.*

II. THIS COURT SHOULD GRANT THE WRIT TO ADDRESS THE DENIAL OF A CERTIFICATE OF APEALABILITY AS TO PETITIONER'S *MIRANDA** CLAIM.

Respondent concedes that a line of Seventh Circuit cases dealing with the certificate of appealability ("COA") requirement of 28 U.S.C. § 2253(c)(1) has been "abrogated" by this Court's decision in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). Br. Opp. at 12. Yet Respondent urges this Court to rely upon one such abrogated case, for the proposition that although the Court of Appeals denied a COA as to Petitioner's *Miranda* issue (Pet. App. A17-A18) and denied reconsideration (Pet. App. A19), Petitioner nonetheless could have included the *Miranda* issue in his merits brief in the Court of Appeals. Br. Opp. at 12 (citing *Porter v. Gramley*, 112 F.3d 1308 (7th Cir. 1997)).

This Court should grant the writ to address the Seventh Circuit's improper COA procedures which violate this Court's holdings that COA procedures are distinct from merits proceedings and that the denial of a COA precludes jurisdiction over the merits of a claim. *Miller-El, supra.*

Respondent argues this Court should give *res judicata* effect to the prior denial of certiorari as to the denial of a COA on the *Miranda* issue. Br. Opp. 13. In *Teague, supra*, this Court held the "denial of a writ of certiorari imports no expression of opinion upon the merits of the case." 489 U.S., at 296 (citations omitted). "The 'variety of considerations [that] underlie denials of the writ,'" this Court wrote, "counsels against according denials of certiorari precedential value." *Id.* (citations omitted).

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* *Miranda v. Arizona*, 384 U.S. 436 (1966).

Indeed, one such consideration is this Court's "policy of strict necessity," under which constitutional issues "will not be determined if the record presents some other ground upon which the case may be disposed of ...." *Rescue Army v. Municipal Court,* 331 U.S. 549, 568-69 (1947). This consideration in and of itself calls for a procedure by which this Court should decline to consider petitions relating to the denial of a COA when a circuit court has granted a COA as to one or more issues, and the resolution of the merits of those issues may obviate the need for this Court to exercise jurisdiction. Here, for example, had the Court of Appeals correctly determined Petitioner's claim of ineffective assistance of counsel, *see* Section I, *supra,* there would have been no need for the current Petition as to denial of the COA.

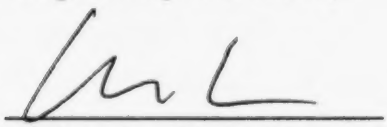
Respondent's argument that Petitioner's *Miranda* claim is not "debatable among jurists of reason," *see Miller-El, supra,* 537 U.S., at 336, must fail. The conclusion of the Court of Appeals (which disagreed with the analysis of the District Court) — that Petitioner waived his *Miranda* rights (*Sweeney, supra,* 361 F.3d, at 331; Pet. App. A7) — is completely undermined by Petitioner's belief (from counsel's advice) his answers to questions could not incriminate him.

Respondent therefore argues that Petitioner cannot meet the prejudice test of *Brecht v. Abrahamson,* 507 U.S. 619 (1993). This argument also fails. The Court of Appeals held Petitioner could "easily meet" the prejudice test of *Strickland, supra. Sweeney, supra,* 361 F.3d, at 334; Pet. App. A13. Justice Scalia has described the *Strickland* test as "even less defendant-friendly" than the *Brecht* test. *United States v. Benitez,* __ U.S. __, __, 124 S.Ct. 2333, 2342 (2004) (Scalia, J., concurring). Petitioner can "easily meet" the *Brecht* test.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,



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